This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

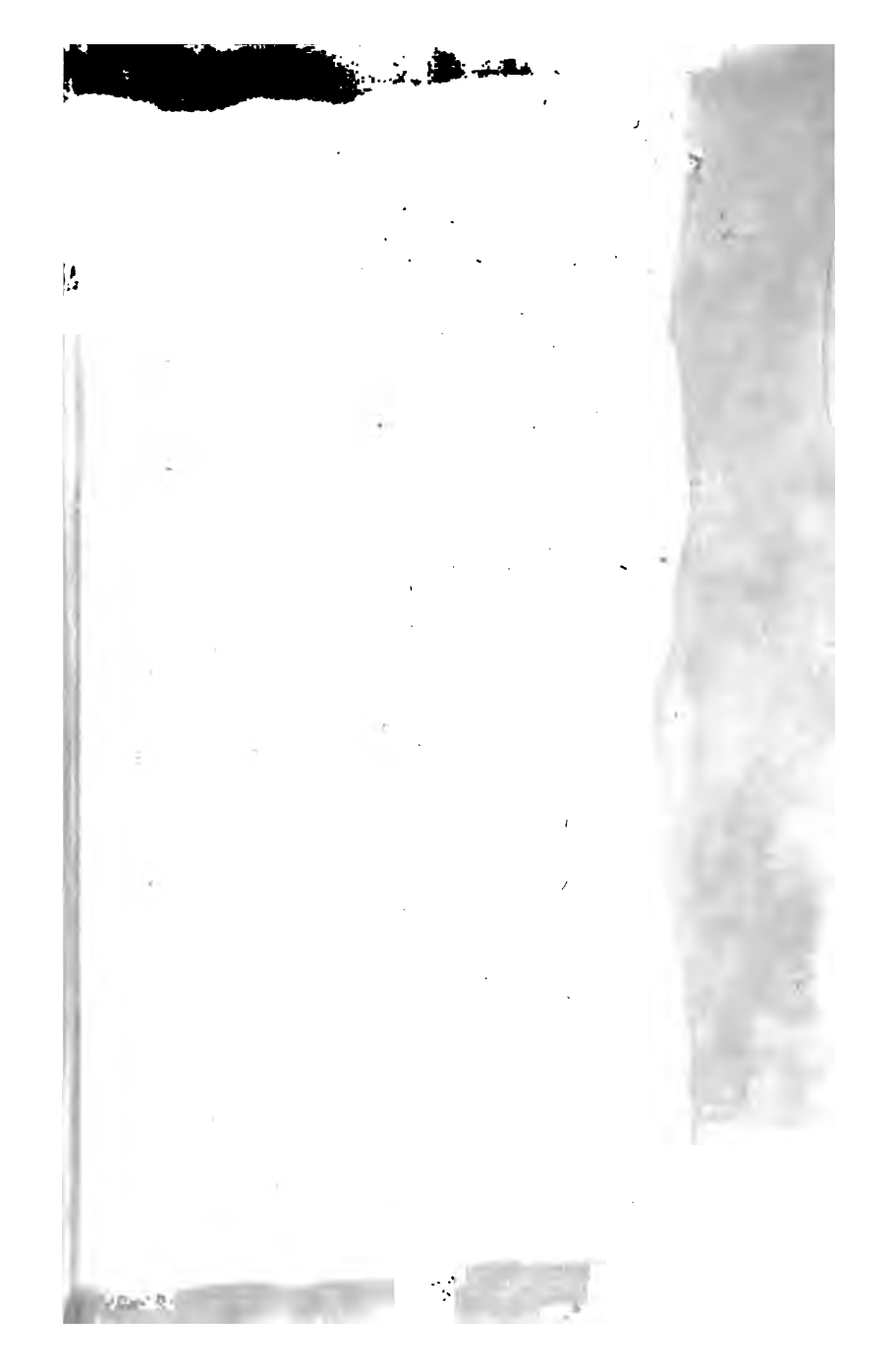
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

JSN
LWZ
SXE2
V.1



EUNOMUS:

OR,

DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

OF

ENGLAND.

WITH

An ESSAY on DIALOGUE.

By EDWARD WYNNE, Esq.
Late of the INNER TEMPLE.

The SECOND EDITION.

VOLUME I.

LONDON:
Printed for BENJAMIN WHITE and SON, at
Horace's Head, Fleet-Street.
MDCCLXXXV.

PREFACE.

IT matters little to the Public, who are now in poſſeſſion of theſe papers, in what manner the Editor came by them: or why, after they have been kept in obſcurity ſo long ſince the date of their compoſition, they come at length to ſee the light. It is incumbent, however, on the Editor, to ſay ſomething of the nature of the undertaking which he has ventured to preſent to the Reader.

Lord Bacon has introduced one of his pieces into the world with an obſervation, "that every man is a debtor to his Profeſſion." How much more is every man a debtor to his Country, which includes every bleſſing he enjoys; and for the ſake only of which any particular Profeſſion is eſtabliſhed? The maxim then is juſt, as to the univerſality of the debt: the difficulty is as to the means of diſcharging it. Thoſe who are eminently active in the ſervice either of their Country or their Profeſſion, doubtleſs go fartheſt in the application of the principle: But they are not altogether (it ſhould ſeem)

without

without their ſhare of the Contribution, who endeavour to inculcate a reverence to it in others; and to deſcribe the ſtructure and excellence of the machine, of which it is the lot of far ſuperior abilities to regulate the motions. The difference being much the ſame here, as Salluſt *has made between the hiſtorian and the perſon whoſe actions he celebrates:* "Pulch-
"rum eſt benefacere Reipub-
"licæ; etiam bene dicere haud
"abſurdum eſt."

It is indeed the happineſs of very few writers (like Lord Bacon) "*to ſtrengthen the roots and*
"*foundation of the ſcience itſelf;*"

and in ſuch a manner to diſcharge the debt, as to exchange the condition, and become creditors to all poſterity. But the world is generally inclined to make allowance for the difficulty: and even, like a merciful creditor, to accept in many caſes a compoſition inſtead of payment. It is in that view only the preſent performance can pretend to recommend itſelf.

The Author himſelf had many ſcruples about appearing in public: He uſed to think, that his ſubject was of that difficulty and importance, that it was more proper for a Special Jury, *by which he would wiſh his work to be tried, than*

than by the world at large, who are the Common Jury *that ſet upon the reputation of an author in caſes of publication. On the one hand, for the Profeſſors of the Law to treat it merely as a Law Book, was more than he preſumed to think it deſerved; and what in reality was never thought of at the time of compoſing it: Beſides, he doubted thoſe who looked merely for Science would be diſguſted with Imagination. On the other hand, he feared, thoſe who in all their ſtudies ſacrifice either to the Muſes or the Graces, would little reliſh a dry ſubject, though attempted to be put into a palatable form.*

The Author's ſcruples were to himſelf. This idea, however, of conſidering the Public as a Jury, *is not a very extravagant one in the ſubject before us; and in that character the Editor, as a third perſon, for a moment places himſelf on the Bench, and addreſſes the Public at large with reſpect to the fate of the preſent work: and does from this inſtant lay aſide any private regard for the Author, in aſſuming the impartiality of a Judge.*

Gentlemen of the Jury,

This cauſe now before you for your determination is in the nature of a feigned Iſſue: *I muſt obſerve*

obſerve to you, it is not a queſtion of damages; *for the author never ſat about this work with a view to profit; nor is he in the leaſt ſolicitous about the ſale of it, in that light. It is, Gentlemen,* a queſtion of right *merely; in which the Author is to be conſidered as the Plaintiff, and thoſe Readers who happen to diſpute the preſent claim of the Author are the Defendants. And the only queſtion between the parties for you to try, is whether the Plaintiff has a right to that reputation, which is the neceſſary conſequence of ſome publications; which liberal minds prize above*

every

every other advantage; and which the preſent Plaintiff, in conſequence of your verdict in his favour, would be ſure to obtain.

Gentlemen, as the whole evidence neceſſary to decide the matter in queſtion is before you, it is unneceſſary for me to recapitulate it; much leſs will I ſingle out any parts of it, becauſe your determination, I am perſuaded, will be (as it ought to be) grounded not on this or that part, but on the whole taken together. I would rather wiſh, Gentlemen, to direct your attention to ſome points that ariſe from conſidering in the moſt

general view, the importance of the ſubject and the manner of conducting it.

If you ſhould be of opinion that the ſubject intereſts the Public; that the form in which it is treated, is not only uncommon, but taken together with the ſubject is calculated for a few hours to ſupply the place of ſuch books of amuſement as have nothing but the form to recommend them; if you think the notions the author has advanced are, upon the whole, ſupported by the many great names that you obſerve [a] *he has called as his* Witneſſes *on the pre-*

[a] See Vol. iv. throughout.

ſent

ſent occaſion; if you find that he has diſſented with candour where he differs in opinion; if where he cenſures things, he has induſtriouſly ſpared perſons, or where he thought himſelf obliged to cenſure paſſages he has fairly cited them; if, upon the whole, you ſhould be inclined to think rather favourably of his head, and at the ſame time you find no grounds for any imputation on his heart, you will give your verdict in his favour; but if, upon the whole, you think otherwiſe, you will find for the Defendants.

One word I muſt add, Gentlemen, as to the conſequence of your verdict,

verdict, which ever way it may happen to be given: and that both as it will affect the preſent Plaintiff and the world at large. I am ſure Gentlemen of your experience, know the caſe of authors in general is always in ſome meaſure involved in the queſtion about any author in particular. That conſideration on the one hand ought not to induce you in any caſe to judge contrary to evidence; it is your buſineſs, in every caſe, to determine fairly on what is before you, "blame where you muſt, be candid where you can". In this conduct, Gentlemen, on the other hand is intereſted not only your

own

own reputation as a Jury, but the very being of authors and the cauſe of literature.

The conſequence of your determination to the preſent Plaintiff is of leſs importance, but what I muſt not paſs over. This is one of thoſe caſes, where a verdict is concluſive: The Plaintiff can have no new Trial. *If you determine againſt him (which it is very proper you ſhould, if you think his Book dull and unintereſting) your verdict will have the effect of a* perpetual Injunction: *For without affecting the great queſtion of the Liberty of the Preſs, I ſcruple not to aſſert, that if*

if the Public do not receive a Book at firſt, the Author will ſcarce reprint it himſelf; and the Book-ſeller has too great a regard for your judgment to do it for him. But if you ſhould incline in his favour, he will then be entitled to thoſe ſeveral advantages that are conſequential in ſuch a caſe.

For your eaſe I muſt inform you, Gentlemen, this is not a caſe in which the Law requires you to be kept without meat and drink till you are agreed in your verdict; *nor, indeed, are you expected (as in common caſes) to be* unanimous: *your verdict, however, will certainly have greater weight,*

weight, the greater the majority happens to be that concur in the ſame opinion.

Upon the whole, Gentlemen of the Jury, you will remember, though not upon your oaths, *you are upon* your honour: *and I doubt not you will in this caſe, as you would in any caſe of property, give your verdict impartially according to the evidence before you.*

AN

ESSAY

ON

DIALOGUE;

PARTICULARLY ON

The Application of that Form of Writing to Matters of Law;

BY WAY OF

INTRODUCTION

TO

The following DIALOGUES.

Ut in vitâ, ſic in ſtudiis pulcherrimum et humaniſſimum exiſtimo, ſeveritatem comitatemque miſcere.

PLIN. Ep. l. 8.

AN ESSAY ON DIALOGUE.

INTRODUCTION.

AS I would wiſh to remove every objection to the following Dialogues that may well be foreſeen; there is one that I muſt guard againſt at the outſet, as it may poſſibly meet the reader at the very title-page, ariſing from a ſeeming impropriety of the preſent application of the form itſelf. It will be neceſſary, therefore, to

conſider this point with ſome attention.

The form of writing, called Dialogue, profeſſedly imitates converſation, and has many advantages on particular ſubjects, that other forms have not. It enlivens the dryeſt ſubjects; and gives an air of freedom to all: under the appearance of common diſcourſe, it may inculcate the moſt uſeful truths; and by the different characters of the piece, is admirably calculated to remove thoſe prejudices and objections which few ſubjects are free from, eſpecially to thoſe who are little acquainted with them.

On

On this account it is, that ſome writers in all ages have choſen this form: of which it is ſufficient at preſent, to mention the beautiful remains of the Socratic ſchool, in the writings of Plato and Xenophon; and the charming copies Tully has left us of them, at leaſt equal, if not ſuperior to the originals.

Intending to conſider principally the moſt perfect form of Dialogue, I need take no notice of thoſe allegorical ſketches, left us by ſome of the Antients; wherein virtue and vice are deſcribed, under feigned characters, and a more imaginary exiſtence. Such as the

Choice of Hercules in Xenophon, and the Table of Cebes, and ſome of the Dialogues of Lucian. To which I may add (as much of the ſame kind) the Maſque ſo finely fancied by Lord Bacon [a].

Theſe are confeſſedly fictions of a much bolder caſt, and want nothing of poetry but metre.

The perfect Dialogue, tho' it comes much nearer to real converſation, has, however, a race of fancy, that puts it much above the level of common proſe; if it may not be looked on as a kind of poetry. In which notion, I may ſhelter myſelf under the au-

[a] See his Letters publiſhed 1762.

thority

thority of as exact [b] a judge of compoſition as the World ever knew: for Ariſtotle allows that metre will not of itſelf conſtitute poetry, tho' it may be eſſential to it. Indeed if it did, a real hiſtory by a new arrangement of words might be turned into a poem; or Homer and Virgil by mere tranſpoſition might be degraded to plain proſe. Neither of which, thoſe who have any idea of poetry, will bear to hear.

The invention [c] and fancy are alone of the proper eſſence of poetry:

[b] Ariſtot. Poet. c. 1. p. 2. Edit. Oxon. 1760.

[c] Hence the very name of poet, who in the language of one of the firſt of them "*can*

poetry: and any compoſition, whatever be its ſubject, or however it may be founded on real events, or contain moral truths, if it be as it were coloured over by fiction, approaches more or leſs to the

give to airy nothing a local habitation and a name." And hence Lord Bacon, in the paſſage often cited, deduces the pleaſure we feel in reading the ſublimer poetry, vol. 1. p. 42. Ariſtotle, who derives this pleaſure altogether from our natural love of imitation, is not however inconſiſtent with the other account. And tho' the cauſe aſſigned by him, is common to the other imitative arts, yet when their connection with poetry is conſidered, he will not be thought to have gone too far: for even Lord Bacon's reaſoning concerning poetry, is in a great degree applicable to the other principal mimetic arts.

nature

nature of poetry. It is in this view, that real hiſtory may be made the baſis of a good poem, provided the events are not minutely copied, and ſuch events as are related, are interſperſed with epiſodes, and connected by poetical machinery. Of which kind are Lucan's Pharſalia; and Shakeſpear's Hiſtorical Plays.

The form of dialogue, in the very nature of it, borrows the aid of fiction; the ſcene which it repreſents, and the characters of which it conſiſts, are pure efforts of the imagination. But as its view is to inſtruct as well as to amuſe, the reins muſt not altogether be guided by fancy; but

ſome ſettled path is at leaſt to be purſued. It muſt be in ſome meaſure of a *didactic* as well as of a *dramatic* nature: one of theſe muſt be all along made conſiſtent with the other. It muſt be in dialogue, as in a profeſſed didactic poem. To inſtruct, as well as to pleaſe, is indeed ſuppoſed to be the end and aim of all poetry; but this end ought to be kept cloſer in view in didactic poetry than in any other. A poem written on this model, that fails of inſtruction, by not conveying uſeful precepts, ceaſes to be a didactic poem: and if theſe precepts are not conveyed in a pleaſing manner, they had much bet-

ter

ter have been delivered in plain proſe. A poet who has imagination enough for this manner of writing will find variety of ways to prevent the inſtruction, which he would wiſh to interweave, from being tedious. He will ſometimes, for inſtance, throw events, or the ordinary occurrences of human life, into allegory; at other times he will chiefly mark what he deſcribes, by an intimation of its probable conſequences; or inſtead of formal compariſons will rather hint the reſemblance in its moral application.

Fiction then in a didactic, as in other poems, will all along join

with truth; but with this difference, that as in other poems, it is chiefly required that fiction has the air of truth; here truth itſelf wears the maſk, and

"Men muſt be taught as if you taught them not."

It is juſt ſo in dialogue: the didactic nature of it conſiſts in teaching ſomething by feigned characters, and in an imaginary converſation: but the dramatic caſt of the work muſt ſoften the rigour of profeſſed inſtruction.

Real converſation is of all things whatever the moſt incapable of ſet rules. The few obſervations that have been left us on that ſubject by Tully, Bacon, Temple,

Temple, and Swift, are rather hints to avoid faults in it, than means of improving it. In the various intercourſe of mankind, ſo widely different in their temper, education and ways of life, what rules or reſtrictions can be neceſſary, but thoſe which decency and common ſenſe will ſufficiently dictate?

Written converſation, however, has not the privilege of being ſo free and unconnected as that in life. Dialogue, indeed, is the moſt free of all kinds of writing, and in that too it reſembles converſation; but it ought not to reſemble it, in flying from one ſubject to

to another, without any kind of thought, view or connection. When the ſubject is once choſen, it muſt be purſued, in ſome ſettled plan; or the characters in it may as well have recourſe to obſervations on news or weather, which are the uſual topics of barren or exhauſted converſation.

But the eſſential requiſites of a perfect dialogue will be better underſtood, if the double nature of it is a little cloſer conſidered. When I ſpeak of its *dramatic* nature, it muſt be owned, the term is rather improperly uſed in its general ſenſe; becauſe the accompanyments of the drama are

concerned

concerned here rather than the action which more immediately belongs to it, and from whence it is denoted: but in conſidering Dialogue as a dramatic compoſition, I mean, it will require a ſcene and characters. The ſubject, whatever it is, is not to be entered on nobody knows when, where or why: tho' the ſubject itſelf will go a great way in pointing out a proper ſcene, the different characters, and form of introduction. In laying the ſcene, ſome few Moderns perhaps have out-done their maſters the Antients, who dwell very little on the ſcenery and introduction to their dialogues,

dialogues. Of Tully's, for inſtance, the introduction to the fifth book de Finibus, and that to the ſecond de Legibus, are moſt remarkable. But landſchape painting itſelf can ſcarce be more pictureſque than the ſcenery of ſome modern dialogues: of which Addiſon's and Berkley's are remarkable inſtances.

The reaſon why the Moderns have been moſt ſolicitous in the ſcenery of their dialogues, may perhaps be drawn from conſidering that the whole of their deſign is invention. The Antients, who worked real characters into their pieces, were neceſſarily in ſome degree

degree confined in the choice of their ſcenes on that account: and where they uſed [d] any, commonly fixed on ſuch places for their dialogues, as the perſons who compoſed the party were moſt likely to appear and converſe in. And thus Plato's ſcenes, as well as Tully's, are ſtrictly real, tho' he

[d] In many of Plato's, no ſcene is laid in the opening; as in the Gorgias, Philebus, Meno, Hipparchus, &c. and the Timæus, one of his moſt ſublime dialogues, begins with Socrates counting his companions, and miſſing one that was preſent the day before: the firſt words of the dialogue are "one, "two, three; where, Timæus, is the fourth "who was with us yeſterday? &c. Edit. Serran. vol. iii. p. 17.

is ſuppoſed [e] to have embelliſhed an Athenian ſhade with a plane tree or other ornament, that did not exiſt but in his writings. The Moderns draw their ſcenes principally from fancy: and in ſo doing have the advantage of making them, by the aid of a warm imagination, more agreeable than any preciſe ſpot faithfully delineated; while at the ſame time an imaginary ſcene is beſt ſuited to artificial Characters. But whatever the Antients may be thought to want in the ſcenery of their dialogues, they abundantly make up for, in the occaſion of

[e] Cic. de Orat. l. 1.

them;

them; the manner of connecting the introduction with the ſubject; and the plan of conducting them; to imitate which with ſucceſs, ſeems to be all they have left for thoſe who come after them to hope for.

In the *dramatic* part of dialogue, the choice and management of the Characters are principally to be attended to. They muſt throughout the piece be uniform and conſiſtent: he who in the beginning of it wants information on the ſubject, or comes violently prejudiced againſt it, is not without apparent probability to cloſe the converſation with a

victory over his own ignorance or prejudice; much leſs to become the wiſeſt of the whole company in what at firſt he was moſt a ſtranger to. This great rule, as to the conſiſtency of character, is founded on a regard to probability; and is no other than the well known one of Horace, for the real drama.

But as the *didactic* nature of dialogue introduces the greateſt limitations on the Characters, to avoid repetition, ſomething muſt now be ſaid on that head. All Dialogue propoſes to inform in ſome meaſure upon ſome ſet ſubject; but the writer, who propoſes

poſes to inform us this way, muſt above all, be cautious of doing it with oſtentation. Writers in common form are too apt to affect an undue ſuperiority over their readers; in this form it would be intolerable: becauſe ſuch a conduct would be intolerable in real converſation, of which this mode of writing is a copy. Sir William Temple, ſpeaking of human life, ſays, "the mind of man is "like the ſea, which is neither "agreeable to the beholder, nor "the voyager, in a calm or in a "ſtorm; but it is ſo to both "when a little agitated by gen-"tle gales."—In converſation too

the freſh gale may be thought preferable to the dead calm: it will be flat and inſipid if the reply is all along only the echo of the obſervation. The minds of men in this reſpect may be conſidered (as opticians do all the bodies that ſurround us) as ſo many radiating points; all capable of reflecting more or leſs light from themſelves. To extend and apply this alluſion to converſation, one would rather wiſh the ray of light that comes from the reaſon of one man to have its own proper refraction, as it paſſes through the medium of another's underſtanding; than to be like a ray falling

ing on a poliſhed ſurface, and reflected back again exactly as it falls. In converſation thus varied, the harmony will be like that in a concert of muſic, more agreeable for the variety of inſtruments; each of which will be diſtinguiſhed by its peculiar tone and effect, and all united will contribute to the excellence of the whole.

Dialogue therefore, which is the copy of free converſation, muſt take care not to degenerate into diſſertation. In the Characters employed, it muſt above all things ſhun the air of a Lecture. The Characters muſt in general

be of a level in moſt reſpects; and tho' it is the province of one perſon to take the lead on the main ſubject, the reſt are not to be mere cyphers: they are to make their obſervations, propoſe their objections; allow what they think is juſtly advanced; deny, what is not. There is no occaſion to add, the ſubject ſhould have ſome importance in itſelf; becauſe, who aims at teaching what nobody deſires to know? The writer too ought to put his own real ſentiments in the mouth of his principal perſon; the reader will then have his clue, and will not impute contradictory

dictory ſentiments to the writer; ſince it will be his own fault if he does not diſtinguiſh the Characters, and the doctrine from the objection.

Having ſketched out this eſſay, and a conſiderable part of the following dialogues, before the republication of a ſet of moral and political dialogues, I was alarmed on finding by a preface then firſt added, that in forming my thoughts I had differed ſo much from the ingenious author on this ſubject.

It muſt be agreed to be a point in itſelf of no imaginable conſequence to the happineſs of life, or the cauſe of letters, which

of

of us is in the right in the notions advanced; and ſo far it does not deſerve even the ſhadow of a controverſy. And yet the reſpect I have for a writer ſo juſtly eſteemed, requires me to look a little into the difference between us; and ſee whether I may truſt what has been ſaid in this eſſay, as a defence of my plan; or whether the eſſay and dialogues are not at once overturned by moulding them into a form, in his opinion, [e] "ſo eſſentially "defective."

The principal thing about which we differ, is the neceſſity he inſiſts on of chuſing *real* Cha-

[e] Preface, p. 16.

racters

racters for the ſpeakers in a dialogue: that the choice of fictitious Characters "is contrary to "the practice of the old writers; "and (as he urges) to the infi-"nite diſadvantage of this mode "of writing in every reſpect [f]."

As I will own I had no ſuch thoughts while I was writing on the ſubject, my manner of treating it was on thoſe large grounds I have already chalked out in this eſſay: in which I have rather conſidered the nature of this kind of writing in the abſtract, as reſembling converſation; than ſuppoſed any particular characters

[f] Preface, p. 16.

were

were neceſſary to maintain a converſation on a given ſubject. The diſadvantage in general of introducing Characters known in hiſtory, ariſes from the difficulty of ſupporting them. The rule here is the ſame as in Horace—

Aut famam ſequere, aut ſibi convenientia finge,
Scriptor. Homereum ſi forte reponis Achillem;
Impiger, Iracundus, inexorabilis, acer,
Jura neget ſibi nata, nihil non arroget armis.
Sit Medea ferox invictaque, flebilis Ino,
Perfidus Ixion, Io vaga, triſtis Oreſtes.
Si quid inexpertum ſcenæ committis, et audes
Perſonam formare novam; ſervetur ad imum
Qualis ab incepto proceſſerit, et ſibi conſtet [g].

In copying a real character then, if the lines of the portrait do not convey a ſtriking likeneſs, it will be little better than ſign-poſt

[g] De Art. Poet. v. 119.

painting.

painting. It will be like the *individium vagum* of the Logicians; and can no otherwiſe paſs for Socrates, Mr. Locke, or Mr. Addiſon, than as they happen to reſemble the reſt of the ſpecies.

Beſides, in ſome particular caſes the propriety of the deſign itſelf, however well it may ſucceed in the management, may be more ſtrictly canvaſſed; as will be evident from one of the learned writer's own inſtances, that of the *Minute Philoſopher*; where the contrary has been obſerved. And would it indeed have been right "in one of the beſt and "politeſt of our writers," as that

author is allowed to be [1]; or rather would it have been doing juſtice to any dead or living character, to have delivered it down to all poſterity, marked as an Atheiſt or Freethinker, by its *real* name? The purpoſe of thoſe dialogues was to refute ſuch notions: the purpoſe was every way ſuitable to the character and abilities of the writer. But it was to be done by arguments levelled againſt the cauſe in general, not by branding with infamy any particular perſon. If the perſon was dead, what was advanced as his notion, might poſſibly have been a miſ-

[1] Preface, p. 15.

repreſenta-

repreſentation; if he was then living, it might have been a libel: becauſe, tho' the law will puniſh every open inſult on Religion or Government, it does not authoriſe any private writer to take the correction into his hands; much leſs will it ſuffer him to invert the rules of juſtice, and by a direct attack on a real character, to let the puniſhment precede the conviction of the crime.

But the caſe I have put indeed is a very particular one; and tho' it does reſult from the doctrine in general, I am aware it is by no means to be made an objection to the excellent writer now before us,

becauſe he had before excluded certain ſubjects from the province of dialogue [k]. And therefore, whatever qualifications he has required in point of form, they muſt in that view be underſtood to take place only where the thing itſelf is ſuppoſed to exiſt.

Taking it however as to proper ſubjects, (as the following may be ſuppoſed at preſent) tho' there would have been no impropriety in theſe dialogues, to have brought ſome of our great Judges and Chancellors once more on the ſtage; I ſee no neceſſity for doing it, and a conſiderable diſad-

[k] Preface, p. 9, 10.

vantage

vantage had it been done. It would doubtleſs have given the doctrine an air of authority, but then the ſubject itſelf would have been confined in one reſpect; the ſpeakers could have borrowed nothing from the preſent times; and therefore the deſign would have fallen greatly ſhort of what the ſubject obliged me to conſider.

To this it may be aſked me, upon my own grounds, if this form of writing is, as to invention, a ſpecies of poetry, why not obviate this inconvenience as the poets[1] them-

[1] Homer and Virgil have frequently done it. Prior in his tale of Apelles and Protogenes

themſelves have done on the like occaſion? why not ſpeak of things known at this day only, as if they were known at the times of which you write?

But the anſwer to this queſtion muſt be my vindication. The very

genes has humourouſly obviated the objection to ſuch anachroniſms. He makes the painter of Rhodes have his hour of tea-drinking at ſix, and then prepares himſelf for the ghaſtly ſmile of a critic at ſuch a ſtriking abſurdity.

> Tea, ſays a critic big with laughter!
> Was found ſome twenty ages after!
> Authors, before they write, ſhould read.
> 'Tis very true—but we'll proceed.

Poets often carry this fiction a great way, as when real hiſtory is ſhadowed out in the form

very allowance ſuppoſed muſt go upon an admiſſion, that dialogue, after all, is ſtill a fiction; and thence that liberty is aſſumed. And if it is a mere fiction, why all this ſolicitude of chuſing real important Characters, under ſo many difficulties and objections as to the manner of ſupporting

form of a viſion or a propheſy; and in treating of early times, the events of many centuries afterwards are anticipated. Of which kind every body knows the famous viſion in the 6th book of Virgil, and that of Milton comprehending a great part of ſcripture hiſtory. Of the ſame kind too is the fine compliment Shakeſpear has paid to his own times in Archbiſhop Cranmer's propheſy at the Princeſs Elizabeth's chriſtening.

them? Why even in aſſuming real perſons is the model to be adopted by halves; the Character to be cloſely copied, and the known peculiar ſtyle of the ſpeaker at the ſame time to be neglected, or at leaſt "infinitely reſtrained [m]?" The fiction is certainly more ſimple in the creation of a Character; and nothing is then left to the writer but to preſerve its conſiſtency. If this liberty is allowed in the more rigorous repreſentation of human life, in the real drama, why not much more in this ſpecies of dramatic compoſition? I muſt all

[m] Pref. p. 44.

along

along however avail myſelf of a diſtinction between *fictitious* and *fabulous* perſons; the one having never had any real, the other not being capable of even a probable exiſtence in the mind. Tully's [n] reaſon and example both conclude againſt the latter, but can ſcarce be urged to the ſame extent againſt the former.

And although even this "is "not copying the Antients [o]," it is not the leſs laudable on that account: it at leaſt gives the merit of invention which will more than balance the chance of a defective imitation. And the very

[n] de Senectute, c. i. cited pref. p. 21.

[o] Preface, p. 14

names of thoſe who have ſhone in this kind of dialogue, will incline me to think it is rather too much to ſay, " they have written be- " neath themſelves only becauſe " they did not keep up to the " antient ſtandard [p]." Nor have they by any means loſt ſight of the " way which good criticiſm " recommends [q];" (which is nothing elſe but reaſon and common ſenſe applied to particular ſubjects) tho' they have departed from the practice of antiquity. Under thoſe great names I ſhall ſhelter myſelf, and leave the ingenious writer to make the moſt

[p] Preface, p. 16. [q] Ibid. p. 15.

of

of a ſpot he has ſo lately recovered, after it had been in his opinion loſt to the world for ſo many ages; and which like a ſlip of land regained from the ſea, is the proper reward of the induſtry that reſtored it.

After this long, but on my part not immaterial digreſſion, (the object of which, I muſt repeat, was my own vindication, and not in any degree the cenſure of the writer from whom I have differed) I return to the obſervations formerly drawn up; and come next to conſider the ſubjects of Dialogue; which have been as various as of moſt other kinds of writing.

The Antients have chiefly confined this form of compoſition to moral ſubjects: the Moderns have enlarged the plan; they have, beſides conſidering the great art of living well, touched likewiſe on ſeveral other arts that tend to refine the manners, and make life paſs away agreeably. Without particularly mentioning the ſeveral dialogues of different kinds, I ſhall content myſelf with reminding the reader of the moſt conſiderable names among our own writers, that have entered this liſt; thoſe of Lord Clarendon, Dryden, Lord Shafteſbury, Addiſon, Biſhop Berkeley, Mr. Spence; and ſome excellent writers now living, Mr. Harris

Harris, and Dr. Hurd; to which I may add ſome of the dialogues of the dead, ſuch, I mean, where the Characters and the ſubject are drawn from true hiſtory rather than mere fabulous antiquity.

There are not many ſubjects perhaps, that are excluded by their nature from being treated of in this manner. To ſay in general what are improper, we muſt again look back on the nature of dialogue, as "teaching by converſation." The manner of teaching therefore, and conſequently the thing taught (which will often have a manner of its own) muſt be ſuch, as is not repugnant to the

the genius and nature of converſation. Dialogue may (indeed it ought, to) imitate the better kind of converſation; and if poſſible elevate the ſubject by the choice and formation of the Characters. But the queſtion here is about the propriety of the ſubject itſelf.

And every body will allow at firſt view, any ſubject to be improper for a dialogue, which it is impoſſible to form any knowledge of from bare converſation. A dialogue for inſtance upon the elements of geometry or arithmetic, would be ſuch a flagrant abſurdity, that no one who has

imagination enough to chuſe this way of writing, will have ſo little common ſenſe as to pitch upon ſuch ſubjects. There are indeed parts of ſcience, cloſely connected with both geometry and arithmetic, that writers of character have nevertheleſs made the groundwork of dialogues. Of which Fontenelle's dialogues on the plurality of worlds, and Algarotti's on light and colours, are well known inſtances. But then theſe ſciences being converſant about common appearances; ſuch appearances as ſtrike the ſenſes and captivate the imagination, when enriched by deſcription, may

may very well be ſelected from the maſs of diagrams and demonſtrations with which they are blended in a ſyſtem; and thus a great part of theſe ſciences may be worked into very pleaſing dialogues, tho' the ſciences themſelves can never be thoroughly underſtood on ſuch eaſy terms. It is much the ſame in a didactic poem: Science can never be taught in a poem, becauſe the air and formality of ſcience muſt be dropped in a poem as much as in a dialogue. The latter indeed, as to the rule of probability, is more ſtrict than the former; (and in that reſpect reſembles the old rule of drama-

tic poetry) becauſe it ought to have ſuch a ſubject, and be ſo conducted, that it may not ſeem improbable to be communicated and underſtood in a ſingle diſcourſe: whereas a didactic poem is not confined at all in point of time.

Some ſubjects then are of ſo abſtruſe a nature as to be unfit for converſation pieces; others are of a nature too trifling for compoſition. But of this kind writers and readers muſt judge for themſelves.

The ſubject of Law in general ſteers very happily between theſe two extremes. Its connection with morality;

morality; its being what every body in ſociety muſt live under, and conſequently know ſomething of, will always make it an intereſting and not a difficult ſubject for converſation. And this propriety which ſtands its ground in the eye of reaſon, has an additional ſupport from very early example. The treatiſes of Plato and Tully of this name, are ſtill extant to vindicate the aſſertion.

The Law of England in particular, ſo very liberal and diffuſive in its nature, will ſcarce be diſputed to afford many entertaining and inſtructive topics of diſcourſe. One reaſon to recommend

mend this way of writing upon ſuch ſubjects, may be drawn from a circumſtance to which law and dialogue have equally a relation, that of "argument," by which I mean the exerciſe rather of a natural than artificial kind of logic.

It is no ſmall excellence of converſation to make uſe of this: without this it muſt degenerate into dry narrative or bare matter of fact. Repartée is the life of dialogue; and this is a form of argument as much ſuited to the genius of converſation, as the Enthymeme is to the beſt pieces of eloquence; which for that reaſon

reaſon was called by Ariſtotle the *oratorical demonſtration*, [r] as containing a juſt form of reaſoning, and eaſily reducible to the moſt perfect *ſyllogyſm*; but at the ſame time without its fetters or parade. What I have ſaid in this light of repartée as the great ornament of diſcourſe, can never be underſtood of a common, tho' improper uſe of it, both in life and writings; the practice of merely refining upon words, and torturing them into ſo many different ſenſes in the moſt trifling attempts towards wit: this at beſt rather de-

[r] ἔστι δ' ἡ ἀπόδειξις ῥητορικὴ ἐνθύμημα. . . . τὸ δ' ἐνθύμημα συλλογισμός τις. Rhet. l. 1. c. 2.

ſerves

ſerves cenſure than imitation; its very excellence (as Lord Bacon has obſerved [a]) often proceeds from ſhallowneſs, as the leſs deep a river is, the quicker light reflects from its ſurface. A wit of this kind, like an echo, will for ever have the laſt word, becauſe he is unable to have the firſt.

——— nec reticere loquenti
Nec prior ipſa loqui didicit———

But the Repartée that is founded on ſentiment is a cloſer kind of argument. Beſides the inſtances of this kind to be met with in the moſt improved converſation, there are many ſcenes

[a] Eſſay on Converſation.

in ſome of our beſt comedies that ſhew it in great perfection.

It being admitted then, that real converſation, and conſequently dialogue, the copy of it, is often argumentative, and with great propriety; it will be hardly queſtioned, whether Law is of that complexion. Some ſciences are in their nature addicted to ſpeculation and retirement; like ſome plants that flouriſh only in the ſhade. Horace would have us believe all writers are of this caſt.

Scriptorum chorus omnis amat nemus, & fugit urbes.

But this Profeſſion muſt be learned, as it muſt be practiſed, in

in a crowd, and among the "buſy "hum of men." It is (as the wiſe Scriblerus obſerved of logic) "a polemical art, that can no "more be learned alone than "fencing or cudgel playing." It has a more particular relation to logic than any other art; if it is not one continued practice of it. And it was no great ſatire (however meant as ſuch) to call [1] the learned in it, "anſwerers by "Profeſſion."

Beſides what has been advanced, drawn from the argumentative genius of law, to recommend dialogue on the preſent occaſion; the

[1] View of Lord B. Philoſophy.

eaſy manner in which many points are capable of being explained by deductions from plain obvious principles; the fondneſs with which it is obſervable any news of that kind is always entertained in real converſation; the practice of furniſhing ſeveral humorous ſcenes in comedies[u] from this ſource; and

[u] As in Shakeſpear's Henry the Fourth, and the Conſcious Lovers. Wycherley's Plain Dealer is ſo remarkable an inſtance of this, as to be faulty through the exceſs. One of the moſt ſtriking characters in that piece, and a female one too, is ſo great an adept in law, that I fear the humour of the character, which is truly great, can hardly be thoroughly reliſhed by any but lawyers; tho' it is but juſtice to add, that this character has in our days had the greateſt advantage from the repreſentation of it.

above

above all the public manner of diſtributing juſtice in this country; all taken together may juſtly ſuppoſe ſomething of law to be ſo well underſtood as to be no improbable ſubject for dialogue.

In ſaying which I muſt be underſtood to vindicate the propriety of the ſubject in general, by no means to inſinuate, that a dialogue on this (or indeed on any other) ſubject, will be equally level to all capacities. Thoſe who are bred to the Profeſſion, will unavoidably have ſome advantage; but the leſs technical the ſtyle of a dialogue is, the more proper and perfect it will be in that reſpect.

On the other hand, it is ſome degree of credit to the ſtudy of the law, that it is ſuſceptible of ſo mild and engaging a form: it is an eaſy anſwer to thoſe imputations our law is too often loaded with, of being at beſt a dry ſtudy; and in the opinion of many, a mere jargon of different languages.

I ſcarce know any thing that can more effectually wipe off this ſtain, than a view of the great variety of manner with which our beſt writers have treated on law; each in a manner agreeable to the ſubject, tho' each has ſet it in that light his own imagination directed.

To

To paſs over thoſe funds of knowledge ſo copiouſly diffuſed in reports, ſyſtems and abridgements; the beſt original writers (whom alone I ſhall regard at preſent) on the ſubject of law, may be claſſed in ſeveral ſorts.

1. That of commentary on ſome text-law; of which ſort are Lord Coke's Inſtitutes, Fitzherbert's Natura Brevium, and the antient readings on ſtatutes.

2. That of treatiſe, on the law in general, or on ſome particular ſubject; as that great ſtandard of Littleton's, thoſe treatiſes of Finch, Perkins, Lord Coke's on copyholds, Lord Hale's hiſtory, and indeed moſt others.

3. That of expatiating "on "maxims of law;" that is, unfolding thoſe principles of law, that hold in ſo many caſes as to obtain the place of axioms, or truths worthy to be aſſented to upon the bare propoſing them. Lord Bacon ſeems to be the firſt and principal writer that has uſed this way; and it is in its turn a very valuable one.

4. The method of propoſing queries, as thoſe of Mr. Noy, and the book under this title, ſuppoſed to be Plowden's [w]. This method has its uſe as being the opinion of great men in points that

[w] Athen. Oxon. vol. 1. p. 176.

have

have occurred to them in ſtudy or practice, and are not determined by any judicial authority.

5. The laſt method of writing law that occurs, is that of dialogue.

The preceding method of putting queries, and inſerting reſolutions immediately, if the objects of thoſe queries were undetermined points, and conſequently not ſettled law (as I have conſidered them, and) as the term ſeems to import, might be conſidered as the firſt rude form of a Law-dialogue. Although, if there is any foundation for what has been ſaid, in general a dialogue

logue conſiſting merely of queſtion and anſwer, is extremely imperfect. It is "didactic," juſt as other treatiſes are, but has nothing "dramatic" in it; no diverſity, and at the ſame time conſtant peculiarity of Character, which are of the eſſence of perfect dialogue; the parts in it are no other way diſtinguiſhable than by the mere initial letters, or the bare queſtion and anſwer. And yet of the few ſpecimens the law can boaſt of this kind of compoſition, this imperfection is but too viſible.

The moſt antient piece of this form, is the dialogue de Scaccario,

of which there is a tranſcript[x] both in the Red and Black Book. The next in order of time, is that of Lord Chancellor Fortescue's de Laudibus Legum Angliæ, written at Berry, in Hen. VI. time: that of St. Germain's, called Doctor and Student, written before 1460, in the reign of the ſame king. A dialogue on Juries, ſuppoſed to be Sir J. Hawle's, written in K. Will. time, little more in form than queſtion and anſwer; and the beſt part of it in ſubſtance, little more than an abſtract of the reſolution in a famous Law Caſe.

[x] See the Dialogue in Mad. Hiſt. Exch.

Sir

Sir Thomas More's two books of the beſt State of a Republic and of Utopia, are ſcarce to be claſſed among this ſpecies of writing. Admirable as they are for the purity of the ſtyle, and the vein of fancy that runs through them; they are certainly not properly dialogues: at leaſt they are of a very anomalous form. It is true, they have a Scene and Characters; but thoſe Characters are very faintly drawn: they ſeem a relation in company rather than a converſation; being chiefly a continued narrative, without much interruption from the audience.

Of the other dialogues mentioned, there are but two that have done any juſtice to this form; thoſe of Forteſcue and St. Germain.

The latter, the author of the ſet of dialogues called the Doctor and Student, is happy enough in the choice of his Characters, and the aſſignment of the part that each is to ſuſtain. A dialogue between one who had no aquaintance with law, and one who was to teach it, would have ſoon diſguſted a reader of ſkill and judgment: and none but a perſon of ſkill and judgment could have reliſhed it, if the characters were ſo exactly balanced as to have equal knowledge

knowledge of the ſubject. He has more happily blended his light and ſhade. A ſtudent of the laws of England undertakes to explain to a doctor of divinity, the general principles of the Engliſh law, as well as ſeveral critical points therein; the Divine, ſkilled in ſacred, as well as natural law, is deſirous of being inſtructed in the municipal laws of his country: the Student, qualified to give this inſtruction, is ready to receive it in other points which lay more within the province of the divine. This art of the writer, in laying out his Characters, gives him an opportunity of ſhewing in many inſtances, the union between law and

and conſcience; and of reconciling them in many caſes, where they ſeem to be oppoſite.

But Fortefcue's dialogue of the two is more regular and dramatic: and ('till the agreeable writer above conſidered ſhone out in this path) is perhaps a ſingular inſtance of *real* characters being introduced into Engliſh Dialogue. His Characters are of the higheſt order, and the diſcourſe ſufficiently ſuited to his Characters. He has put the principal prejudices againſt the law of England, in the mouth of the Prince: and anſwered them in his own great Character, ſo fully, that the Prince owns

owns his miſtaken notions; and becomes an entire convert. By this conduct the noble writer has avoided a ſlaviſh panegyric of the law on one ſide, and on the other hand has not left the reader in doubt of the true opinion; for which ſome of the Antients have been juſtly cenſured.

The great outlines of this performance ſeem to be a preference of the Common Law of England to the Roman Civil Law, on a fair compariſon of ſome principal doctrines. And in this reſpect Forteſcue deſerves much commendation himſelf, as he was combating a very unconſtitutional attempt

of

of the then reigning favourite to bring in the civil law. There are ſeveral lighter traits of value to the Profeſſion, as to ſome points, where time has made this writer an Antiquarian, as well as where he explains the grounds of ſome of our modern practice. But I muſt add, that in general he has obſerved that ſtrict propriety, as hardly ever to launch into his ſubject beyond the comprehenſion of one not bred to the Profeſſion.

Having entered at large into the nature of dialogue, the ſubjects it admits of, and ſhewed that law, particularly the law of Eng-

land, is no improper ſubject for this form of writing; and having made ſome remarks upon the few compoſitions that are to be met with on this ſubject, I am now come to the moſt diſagreeable part of my work, to ſay ſomething of the following dialogues.

The laſt dialogue on the Engliſh Conſtitution, is, on account of its ſubject, to be conſidered as the principal of the three. The Conſtitution being founded on law, and intimately connected with it, it was impoſſible to be ſilent on that head. The two firſt dialogues are therefore employed chiefly on that topic. The firſt to

give a more elevated idea of our law, than, I believe, is commonly entertained; tho' I confeſs a much fainter than it deſerves. The ſecond dialogue is taken up in anſwering ſome plauſible objections to ſeveral branches of it; ſuch as are ſtill echoed from one perſon to another, without the leaſt candour or attempt to enquire the truth. I hardly need intimate a reſtriction to the readers judgment, that I do not hold myſelf to be anſwerable for all that is advanced in theſe dialogues, when I declare that my own ſentiments are put into the mouth of Eunomus, and the popular prejudices againſt

either the law or the conſtitution in thoſe of the other ſpeakers.

The ſubject of the laſt dialogue, tho' of ſuch general concern, till of late has of all others been the leaſt touched on. At one or two periods of time large volumes were written about the origin and nature of civil government; (which, however, has been miſerably diſtorted in its turn) and we meet with ſome fanciful excurſions about ideal commonwealths, and perfect models of government: the writers all the while not knowing, or diſregarding, that degree of perfection that exiſted in their own: poſſibly as much

much as a real government will ever admit of, when the adminiſtration of it is in exact conformity to the principles on which it is eſtabliſhed.

It does not fall within the buſineſs of the hiſtorian or lawyer, as ſuch (confined to their own ſubjects) to give a juſt and full portrait of the Conſtitution: it muſt be performed however, from the united reſult of law and hiſtory.

And this, perhaps, is one reaſon why for ſo long a time nothing like a juſt draught has been given us. Forteſcue's dialogue abovementioned, is ſo cloſely confined

to the very letter of its title, "the "Laws of England," that it ſays ſcarce any thing of its Government.

One book does indeed give the moſt ample view of both, that are to be met with in any one antient treatiſe: and yet the book itſelf, tho' formerly quoted on great occaſions, ſeems at preſent ſo little known, that it will be neceſſary to explain myſelf by ſaying it is Sir Thomas Smith's Republick of England, that I am now ſpeaking of. Perhaps it may not be amiſs to give ſome little account of the author as well as of the performance.

And

And here I muſt premiſe, that the faireſt way of conſidering any antient writer of law, is not to view his performance altogether with the eyes of the preſent age as the law now ſtands; for our beſt writers, removed an age or two back, nay, even laws themſelves, will not ſtand that teſt. Above half of Littleton's famous book is obſolete; and a great part even of Magna Charta is become a dead letter. Nor yet is it fair to compare them with thoſe, who have written long ſince; and are now eſteemed the beſt writers on the ſubject. The only proper way is to conſider them as to the time

in which they lived. And in this light, if Sir Thomas Smith's work is of little regard, compared with what may be picked out of the writings of Lord Coke or Lord Bacon; we muſt remember, when Sir Thomas Smith wrote [a] Lord Coke was ſcarce called to the bar, and Lord Bacon was but four years old.

But if his having lived firſt was his greateſt merit, it would be very little indeed. He has touched on many points not within the common ſubjects of Lawyers; and has, on many occaſions, explained himſelf more to the general ap-

[a] Ann. 1565. p. 272. Rep.

prehen-

prehenſion, than thoſe who adhere too much to technical language.

He was qualified by education and experience to do juſtice to his ſubject. He [b] was a very learned

[b] Sir Thomas Smith travelled when young at Hen. VIII. expence; afterwards had the Profeſſorſhips of the Greek Tongue and Civil Law in the Univerſity of Cambridge; was Secretary of State to Ed. VI. and in high employments at home and abroad (during one of which he tells us this book was written, p. 273) under Q. Eliz. See Wood's Athen. Oxon. vol. I. 302. Digge's Ambaſſador contains ſeveral letters and inſtructions to him. And there are, it ſeems, ſtill extant in MS. in the Harleian Collection, ſome political diſcourſes and letters of his. See Catalogue, 660, art. 35. 260, art. 100, &c.

man,

man, long a member of the univerſity, and a great courtier; and had ſerved his country both at home and abroad in ſeveral important ſtations. And when with all theſe advantages, he had opportunities of ſeeing the policy of foreign countries, he had the honeſty, from a juſt compariſon, to prefer the Conſtitution of his own.

He has with the ſame advantages anſwered many of thoſe little cavils againſt the law of England, which thoſe who live under it, unmindful all the while of its bleſſings, and ignorant of the ſeverity of other laws, are ever ſo fond of raiſing. And tho' bred

bred to the civil law, he ſeems to have acquired an intimate knowledge of the common law; and its valuable peculiarities [c].

But this book, precious as it is, on account of its early production, and its intrinſic merit, does not go ſo far into the ſubject as one could wiſh.

To come to the preſent dialogue, there are, I think, other conſiderations than the ſilence of any antient author, that at this time would recommend a more minute deſcription of the Conſtitution: I mean the growth of the Conſtitution itſelf.

[c] See B. 1. c. 37. B. 2. c. 3. c. 8. c. 12. &c.

For

For tho' in the moſt early ages that hiſtory carries us back to, its freedom appears to have been of its very eſſence; and tho', like the ſeed of a plant, or an infant juſt born, it was at its firſt exiſtence perfect in its nature, as to the formation of its eſſential parts; yet time only could dilate thoſe parts to their proper ſize and compaſs: time only can bring government to its full ſtrength and maturity, as it does a plant or an animal. Nothing in its infancy can exert thoſe powers that are the end of its creation.

And what a pleaſure it is to a cultivated mind, in the ſtudy of politics

politics or of nature, to trace things in their progreſs; to contemplate the accidents they have eſcaped; the helps they have received; and the means by which they have imperceptibly arrived to their preſent growth?

This view, one might imagine, would be remarkably pleaſing and inſtructive as to our own government, purſued through its ſeveral periods.—To ſee it, after ſo many ſhocks, advancing each century ſtill nearer to perfection, by the concurrence of a thouſand events which time alone could diſcloſe. To ſee it, at length, arrived to that juſt equality in the diſtribution

tion and exerciſe of power, that for ſo many ages it was an entire ſtranger to; that at preſent other nations can only envy; and that we, who enjoy it, can only wiſh may be fixed and permanent.

All this would recommend the deſign of that dialogue, if the execution could but in any degree be anſwerable to the deſign.

Since a great part of theſe dialogues were written, ſome ingenious works have been communicated to the public, that have ſerved to make us better acquainted with this important ſubject, than we could

be

be from any thing extant before; the writers of which have either collected many materials into a narrow point of view, the better to enable us to form our judgment; or have by their own ſkill drawn exact outlines, tho' they may not have finiſhed the piece. I muſt beg leave to point out ſome only of the particulars I allude to, and that too more by way of explaining my meaning, than in the leaſt to ſuppoſe, what I do or do not mention are not ſufficiently known of themſelves.

The firſt of theſe in order of time, and the ſecond in no reſpect, was an *Aſſize Sermon preached*

preached at Durham, and printed in 1764; and which, in the compaſs of two or three pages, contains, tho' in miniature, a maſterly ſketch of the conſtitution. But I am almoſt precluded from ſaying, even this with any propriety of the performance itſelf, as I am well aware the very name in the title page is an ample certificate for its character in the learned world.

In this review I cannot paſs over unnoticed, the tracts that have been publiſhed concerning *Spiritual and Temporal Liberty*: when I ſay of them (what moſt likely will be allowed by every

body that has looked into them) that they contain a great deal of learning, extenſive obſervation, uncommon candour and good ſenſe; I muſt venture, as to the tracts on *Temporal Liberty*, (with which alone I am concerned) to differ from the Editor in thinking they were left finiſhed for the preſs; as I am apt to imagine ſome paſſages would have been corrected on more mature reflection. It is not improbable that many of the quotations, which take up more than their ſhare of room, would have given way to reaſoning upon them; and the whole have been digeſted in

a different order from that in which they now appear. But as it is, the ſubjects of the tracts are well choſen, and the book is a valuable legacy to the public.

The next thing of the kind I ſhall mention, is a book as extraordinary in its form, as it is inſtructive in its contents; and which in a comment on a ſingle writ, conveys a great deal of knowledge of the Conſtitution. *Sir Bulſtrode Whitlocke's Comment on the King's Writ for chooſing Members of Parliament*, has all the profuſion of his maſter Coke, with much more method. And tho' not a ſingle word eſcapes him,

him, yet his comment will ſcarce be cenſured as tedious or prolix. It is pleaſant to remark the different effect, in this reſpect, ſuch a comment muſt have on a reader, from what we obſerve in ſome of the moſt famous on Virgil or Horace. Here, from a dry confined text, the mind is conducted to the deepeſt receſſes of law and antiquity: in the other, while it is enraptured in contemplating the moſt agreeable ſcenes that the genius and fancy of the author can paint to the imagination; his commentator would abruptly force us to turn aſide, and enjoy with

him an elaborate diſſertation on a point or a particle. And if the Muſe, like another Sybil, did not reſcue us from their importunity, we might ſay of ſuch commentators,

. . . Omne datum traherent per talia tempus,
Ni comes admonuit breviterque adfata Sybilla eſt,
Nox ruit . . . .

Such a one, where his power prevails, has the art of making the fineſt deſcriptions vaniſh from the mind, and leave only a word behind: our commentator, on the other hand, makes a bare word introduce us to the knowledge of the moſt important things.

In the preceding inſtance, the atten-

attention is as it were ſurprized into knowledge. In the next work that remains to be ſpoken of, tho' at the firſt page great expectations may be raiſed from the deſign and credit of the writer, they muſt be more than anſwered in going through the book. For, if in a courſe of academical lectures, the juſteſt view is given of the Laws, with their hiſtory, and of the Conſtitution of this Country; I do not know a more emphatical application of the Grecian ſage's wiſh, "to teach young perſons in the early part of life, "what they may uſe when they

" are men," than is given by the *Commentaries* on the Laws of England. If any body can have an objection to this work, it muſt be myſelf; for I find myſelf partly in the condition of Dr. Middleton, who was told " his book had " been anſwered twenty years be- " fore it was publiſhed." Mine has laid by till it ceaſes, in a great meaſure, to be what it was intended to have been. The third dialogue, as to ſome material parts of it, has been anticipated by the performance now under conſideration, and in ſuch a way as to leave me much in doubt, whe-

ther my manner of ſaying things will atone for the want of novelty in many places. That dialogue, which at the time of writing it, I conſidered "as the "principal of the three," is now become of leſs conſequence; and muſt depend a good deal on its form. The other two I may ſtill look upon as more ſtrictly my own, both in matter and form; but I confeſs this with a great mixture of diffidence and partiality. Though the latter will not ſuffer me totally to deſtroy theſe dialogues, the reſult of ſo many hours amuſement,

yet the former at the ſame time tells me how much I muſt be indebted to the Reader's candour for letting them paſs without cenſure or diſregard. When I compare the ſubject of them with the execution, the leaſt I can do is to adopt the modeſt way in which the Grecian Artiſts owned their celebrated pieces of ſculpture, who expreſſed themſelves in a mode of language *implying imperfection*, intending thereby to ſhew they were about ſuch a Statue, rather than that they had in any degree finiſhed it. How much more does it become me, tho'

tho' I ſhould allow that at ſuch a time "I was writing," to diſclaim all pretenſions "of having written, Dialogues on the "Conſtitution?"

Upon the whole, I am far from pretending that this form of writing is the beſt way of being acquainted with the ſubjects contained in theſe dialogues; much leſs, that the preſent are the moſt pleaſing ſubjects for this form of writing. It is ſufficient for me, if what theſe dialogues contain has weight enough to ſend any of my readers, who before were ſtrangers to the ſubject, to thoſe

great

great authorities, the fountain head, from whence ſuch learning flows the pureſt; and that this mild and engaging form is not improper for the ſubject itſelf.

I ſhall then, with the vanity of an author, compare myſelf to one who in his travels over a bleak and dreary country, has picked up ſome plants, which he afterwards transfers to ſome delightful ſpot, in a milder climate; where their novelty at leaſt may make them admired even among more agreeable productions, by thoſe who would never have viſited them on their native ſoil. And

if

if after all they ſhould have any medicinal virtues uſeful in life, they will be welcome wherever they can be made to grow.

April, 1767.

EUNOMUS;

OR,

DIALOGUES

CONCERNING THE

LAW and CONSTITUTION

OF

ENGLAND.

DIALOGUE THE FIRST.

Mira enim Perſona induci poteſt Britannici Juris conſulti. Hæc Ego non Rideo, quamvis tu rideas. CIC. FAM. EP. 7. 13.

EUNOMUS.

DIALOGUE I.

§. 1. IT was one of thoſe agreeable mornings in the ſpring, when the ſun cheers the whole face of nature; the blooming ſtate of plants, the freſh verdure of the earth, the ſoft air, and muſic of the birds, naturally tended to transfer a ſerenity to the minds of all that admired them. Induced by theſe charms, Policrites ſet out on a viſit to his friend Eunomus, who was ſituated in a pleaſant village, at a few miles diſtance in the neighbourhood.

Upon his arrival, he was introduced into the ſtudy, where Eunomus generally

rally retired after breakfaſt to conſecrate the moſt valuable hours in the day, to the improvement of himſelf. The ſtudy itſelf, by its ſituation as well as its furniture, was well contrived to anſwer this purpoſe. It was built on an elegant model, in a garden, at ſome diſtance from the houſe; from which it was ſhaded by a tuft of trees, and was open to the river, and a fine proſpect ariſing gradually from the bank on the oppoſite ſide. Theſe advantages, beſides affording Eunomus a retreat fit for contemplation, gave him likewiſe a moſt agreeable relief from the fatigue of it. A perſon of his education and enlarged notions, could never want the means of converting ſuch opportunities into an elegant amuſement; and making art contribute to ſet off nature. He had in the courſe of his ſtudies acquir-

ed a taſte for natural philoſophy, and was provided with many of thoſe inſtruments it furniſhes; and which under its directions procure ſo many beautiful images to extend our reaſon and enrich the imagination. Eunomus, indeed, being bred to ſeverer ſtudies could uſe employments of this kind only in the intervals allowed him by his Profeſſion; but he never was of opinion, that the ſtudy of his Profeſſion was inconſiſtent with theſe or any other purſuits held in ſubordination to that, but rather ſeemed to think, that a man was capable of being a better lawyer by being in ſome degree a philoſopher or a divine. For without a habit of reaſoning from general principles, he uſed to think the mind would be ill qualified to judge in particular caſes: and the idea of obedience to laws would often be very imperfect

without recurring at times to a purer ſource of obligation and ſtronger motives than any that laws themſelves can furniſh.

After the uſual compliments paſſed on both ſides, the two friends entered upon various topics of converſation. Policrites caſting his eye upon the table, among other books, ſaw the Odyſſey of Homer opened in that part, where the diſcovery of Ulyſſes to his aged father is ſo pathetically deſcribed.

The affecting ſtrokes of that page, ſays he to Eunomus, which I obſerve has lately engaged your attention, remind me of the loſs I ſhall ſuſtain, by being now obliged to quit thoſe inchanting ſcenes of fancy for the dry and intricate paths of law. I wiſh the poets had leſs power of captivating the imagination, or that their power was attended with leſs fatal

conſequences to the deeper parts of learning. The ſoil of Parnaſſus, I am ſure is barren, however pleaſant the air of it is. But why ſhould I blame the poets in particular, when other arts tending only to poliſh and refine the manners are ſubject to the ſame imputation? Thoſe who are addicted to this Profeſſion, ought to give them all up; or at leaſt muſt allow, that by retaining their fondneſs for theſe, they retard their progreſs in that. They occaſion the loſs of much time, and at beſt are things, with which the ſtudy of the law has no manner of connection.

EUNOMUS.

§. 2. I admire your honeſty (replied Eunomus) rather more than your zeal: your former paſſion for the liberal arts I perceive has not reſtrained you from

thinking freely of their real value; nor has the fondneſs, which you obſerve I ſtill retain for them, hindered you from delivering your thoughts on that ſubject with the ſame freedom to me. It muſt be confeſſed you ſpeak the ſenſe of a large party, who have ever looked upon the black letter in the old Reports and Statute Books as a kind of ſpell on the underſtanding: or, in a more familiar phraſe, as if lawyers had entered into a recognizance to talk and think of nothing but law; and that on pain of forfeiting all ſkill in the Profeſſion. I am glad, however, that you have taken the cauſe into your own hands. You will labour more in its defence, and not rely on numbers of your ſide inſtead of arguments: or, as too many advocates would do, oppoſe the weight of a multi-

multitude of bad precedents to the clear dictates of common ſenſe.

I am perſuaded (for my own part) that all arts and ſciences have ſome kind of connection with one another; and that "Law," as one of theſe, is not, as you ſeem to repreſent it, like one left on a deſart iſland, and ſhut out from all ſociety: but that there is a mutual intercourſe conſtantly kept up between the law and other ſciences; the firſt by protecting the latter, and the latter by the various lights and illuſtrations they afford in the ſtudy of the law.

POLICRITES.

§. 3. Your concluſion is obvious; and it will be little to my honour, if I do not ſtop it in its career, by weakning the premiſes from whence it is deduced. Before I enquire into this connection as a fact, I wiſh you

would explain what you mean by ſo vague a term. And in the courſe of your argument, I ſhall expect you to ſhew, not only that in the reaſon and nature of things this connection between the arts and ſciences ſubſiſts; but that there have been ſome, ſo far advocates for the reaſon of things, that they have made themſelves illuſtrious examples of this union: and not turned all the reſt of the arts and ſciences out of doors in favour of one, either thro' partiality, or for want of room in the underſtanding to receive them.

EUNOMUS.

I ſhould not be unwilling to undertake this taſk ſo much upon any apprehenſions of defect of proof, as of too great a demand on your patience in attending to ſo copious a ſubject: eſpecially to my inartificial manner of

treating it; which, however, you may partly thank yourſelf for, by attacking me ſo ſuddenly, and totally unprepared for an exact defence.

§. 4. Your calling upon me at the outſet for the definition of a term, that both in itſelf, and in this application of it, muſt needs be ſo well underſtood, looks as if you was not very confident of ſucceſs in the merits of your cauſe; and ſo intended to take advantage of every little ſlip in point of form. Your once admired Tully at leaſt ſuppoſed what was meant by this connection to be known; and he ſuppoſed (more than you will allow me at preſent) that it did ſubſiſt: otherwiſe it would have been an uſeleſs topic in defence of his Archias. You remember what Pope as a poet ſaid to Jarvis as a painter; and the illuſtration they mutually gave to each other's ſtudies, "by art re-

"flecting images to art." And certainly the imitative arts, not only as having often the ſame objects in view, but as being alike dependent on the imagination, muſt neceſſarily be capable of aſſiſting each other. The very rules of judging of the works of different arts are often the ſame; and from their reſemblance it is that forms of expreſſion, properly belonging to one, are applied in treating of another. In ſhort, this reſemblance is in a great meaſure the ground of metaphorical language. To this we may add, that arts themſelves often invade each others province; the one imitating what without examples, one would imagine to be the peculiar objects of the other. In proof of what is here advanced, how can we elſe account for thoſe conſtant compariſons with ſculpture, painting and muſic, to be met

with in Ariſtotle, Tully, Horace, Longinus and Plutarch, while they are treating of the works of orators and poets? Has not Addiſon in his travels abundantly proved, that the ſtatues and marbles he met with, are beſt illuſtrated by deſcriptions of poets? And, that in points of antiquity, the remains of ancient artiſts are inexplicable without compariſon, is evident from a thouſand inſtances: before I will permit you to decide againſt me, you ſhall at leaſt read over Addiſon's Treatiſe on Medals; and the Polymetis, written on a larger plan: and tho' I was not to prove the immediate connection between any two particular arts, yet I hope you will allow me to infer a connection between the extremes, if I can prove to your ſatisfaction ſome intermediate art is equally uſeful to any two ſeemingly disjointed and independent. To prove

prove them in any degree auxiliary to the principal, will I think be abundantly ſufficient to recommend them.

POLICRITES.

§. 5. I ſet liſtening with ſome uneaſineſs for fear of turning ſceptic: your argument ſeems to take in the whole circle of ſciences; all are neceſſary at this rate to be attained; and if I cannot maſter them all, I ſhall be allowed to underſtand none; I expect preſently to be told I can be no lawyer without knowing that the angles of a triangle are equal to two right ones; or that the property of a field cannot be diſputed in Weſtminſter-Hall, but by thoſe who know how to meaſure it. Merchants, upon more than one occaſion, have told us that lawyers are improper judges of mercantile controverſies; and the ſame incompetence has,

has, you know, been inſiſted on in favour of eccleſiaſtical juriſdiction, and in excluſion of the common law.

EUNOMUS.

§. 6. Not to mention that your objections have anticipated my argument, and therefore I ſhall take no particular notice of them, now; they all go upon a grand miſtake—by ſuppoſing that a lawyer, to judge in any caſe that comes before him, muſt be an adept in the ſeveral arts of his clients; and that he cannot determine the right in queſtion, without he underſtands the practice of the trades or employments from whence it ariſes. But I may even refute you in your own inſtances; by deſiring you to recollect a paſſage in Xenophon, where Socrates recommends Geometry and Arithmetic as a part of general education, but is far from approving

proving of his ſcholar's exploring the myſteries of either of thoſe ſciences. Or to put you in mind of a later authority—but I deſire no authority may extend beyond the reaſon of the thing; for I mean to obtrude no notions under the ſanction of a great name: but ſtill in juſtice to the authors, when I borrow the argument, I ought to tell you from whence; and I remember the time when an opinion of Socrates or Locke, tho' it had nothing new in it, would weigh more with you, than if it had been a truth ſilently acquieſced in by all mankind.

§. 7. Mr. Locke would ſcarcely have mentioned geometry in a treatiſe of education, unleſs, in his opinion, ſome acquaintance with it, was of general utility. What that utility is, he has hinted more than once in a more perfect work, and on a more weighty occaſion.

caſion. No leſs than the powers of the mind are intereſted in the reſearches into Geometry and Algebra: and I think he has very forcibly explained himſelf on this head, by ſaying, that he recommends theſe "not "ſo much to make men Mathemati-"cians as reaſonable creatures."

POLICRITES.

I know not then whether Mr. Locke would not have had above half the Earth converted into a madhouſe: for at his rate of thinking, one ſex, I believe, muſt be void of reaſon, and many of the other could rarely make pretenſions to it, by producing a certificate of their having ſolved a problem in Algebra. I muſt own he would have made a very loyal ſubject in Swift's kingdom of Laputa.

EUNOMUS.

EUNOMUS.

Your raillery is but ill pointed at Mr. Locke; and the honours you would confer on him in that reſpect ſeem but very little deſerved. His ſkill in theſe ſciences was far (I believe) from that of an adept; and indeed much leſs than he propoſes, will anſwer the purpoſe for which alone he recommends them. For the attention to be acquired by theſe ſtudies; the perſpicuity and juſt form of reaſoning for which they are ſo deſervedly commended; and which they will imperceptibly communicate to every one that is at all converſant with them, may (I will venture to ſay) be learned as well from the firſt book of Euclid as from the ſix firſt. But when I allow with Mr. Locke, and the author of the Analyſt, that Geometry is an excellent logic, I would

would by no means exclude logic properly ſo called: nor would I attempt to inſinuate, that a figure in the literary world might not ſometimes be made without the knowledge of either. They are both confeſſedly, when well regulated, excellent means of forming the underſtanding, and directing it in the ſearch of truth; but they are not the neceſſary, nor the only means. Nature and habit without rules are often ſufficient to attain this end: but who will pronounce any rules uſeleſs, becauſe ſome by peculiar happineſs are able to do without them?

POLICRITES.

I find I may without prejudice grant to you, that there is ſome connection between the arts: but this conceſſion will

will only increaſe my doubts, and your difficulty in ſatisfying them, about the poſſibility of the attainment. You look as if you would have every ſcholar inveſted with all the arts and ſciences, and compleat in himſelf, like the philoſopher in Tully, who had no part of his dreſs but what was of his own making. Beſides, the principal part of your undertaking is ſtill in arrear; to ſhew what a lawyer has to do with them: and for that reaſon I was willing to ſpare you ſome trouble in examining every article of your account; but I expect you ſhould make me amends on this head; otherwiſe I ſhall perſiſt in my intention, and leave you to enjoy your Greeks and Romans by yourſelf. And at preſent, I ſhall rank in the ſame number, as foreign to our profeſſion, the ſtudy of antiquities,

quities, claſſical learning, and all your admired arts; which, however connected with one another, have little or nothing to do with the ſtudy of the law.—But I ſtill lay open to a rational conviction, if you have courage to undertake it.

EUNOMUS.

I hope in general to give you ſome ſatisfaction, and to ſend you away better pleaſed with your own profeſſion than you came here; for it muſt be rather difficult to give up what you ſeem to have once ſo much admired. Beſides attempting to prove even this connection in the abſtract, as I in ſome meaſure did the other, there are many topics (I flatter myſelf) that can be more forcibly applied here than in the other caſe. No doubt you will laugh at me, if I ſhould think of "giving acts

of parliament in evidence on this iſſue:" or refer you to your own report books in ſupport of part of my argument. I ſhall even go ſo far as to produce you ſome illuſtrious examples (as you called them) of this union; and part of my ſcheme will be executed by reminding you of ſome books, which thoſe of your own Profeſſion have obliged the world with; and which beſpeak an acquaintance with ſome of thoſe arts you now diſpute the uſe of.

§. 8. When you called upon me to produce inſtances in our Profeſſion of thoſe who had in themſelves connected law with other ſciences, you did it (I imagine) rather with an air of oppoſition than of real doubt; and as if you would triumph, without a victory. Can I ſuppoſe you are unacquainted with the undoubted evidence, many of the greateſt lawyers have left in works

of

of this kind? Muſt I remind you, for inſtance, how Hale explored the depths of divinity, mathematics, and hiſtory? How the hiſtory of Utopia holds up in the mirror of fancy, the picture of a well-policied ſtate, its arts, its laws, and government? Or am I to repeat to you a catalogue of Lord Bacon's writings, before you will hear of him in this reſpect as "the wiſeſt, brighteſt "of mankind [d]?"

But I think I may conclude, that we have had ſome who have perfectly underſtood many of theſe arts, though they have not left or ever written a ſingle treatiſe upon any of them. I will conclude this—either if it is atteſted by credible witneſſes; as Addiſon and Swift both allow of Lord Somer's, for inſtance,—or if in their writings on other ſubjects, or their

[d] Ethic Epiſt. 4th.

public elocution, ſuch a vein of imagination runs thro' their arguments, ſuch a ſpirit in their images, that they could no more expreſs themſelves in ſuch a manner without having a natural turn for the liberal arts, and having been much converſant with them, than you can ſuppoſe a repreſentation in a mirror without the preſence of the object it reſembles; or a parody on Homer or Virgil made by a perſon who has never read the paſſage to which it alludes. But for evidence of this kind, you muſt read the characters of hiſtorians; tho' in this reſpect recent tradition is often perhaps a more faithful regiſter than hiſtory. After what I have offered, and what you may collect on this head, I do not know whether it will be too much to ſay (as Finch has ſaid) "that the "ſparks of all ſciences in the world, "are raked up in the aſhes of the law."

POLICRITES.

Oh no; it is rather ſaying too little than too much, every thing conſidered. Finch himſelf, indeed, is a little too narrow in his premiſes, tho' he makes up for it in his concluſion. If I remember right, he reſts the connection of the law chiefly with the arts of logic, grammar, and other dry ſpeculative ſyſtems. But the more ordinary and familiar ocurrences of life, are not without contributing their quota of legal knowledge. Thus, for inſtance, the ſage Littleton deduceth the very name and nature of bringing eſtates into hotchpotch from a "pud-"ding," and gravely informeth us of the reaſon of the name, becauſe (ſaith he) "in a pudding is not com-"monly put one thing alone, but "one thing with other things toge-

" ther." And nobody, unacquainted with our good old writers, maſter Bracton and maſter Briton, would imagine that ſo common an object as a bowl rolling down a hill, might lead us to a true theory of deſcents of inheritances: for the ſingular circumſtance in our law, of eſtates never aſcending to the father, is accounted for by them from the law of gravitation. And then how much muſt we be intereſted in the ſtudy of natural hiſtory, to trace that exact ſimilitude, Lord Coke tells us (from the parliament rolls) is ſubſiſting between an elephant and a member of parliament. Happy for our good country in this reſpect, that the law has eſtabliſhed it as a maxim " that no ſimile goes " upon all fours."

Juſt about this part of the converſation, a pleaſure boat was going along the

the river, and the muſic was playing; which echoing from the riſing hills, and ſoftened in its progreſs over the ſurface of the water, agreeably ſurpriſed the two friends, and for a few moments interrupted their diſcourſe.

But Eunomus taking advantage of the incident that occaſioned the intermiſſion, aſked his friend, whether he thought muſic an enemy to law?

POLICRITES.

§. 9. Its not being an enemy only, will not anſwer your purpoſe; the queſtion is, "what connection has it with law?"

EUNOMUS.

The ſame connection, I ſhould think, that good ſpirits and a calm unruffled temper have. And tho' it is not every body that loves muſic; or if

they did, would it be worth while on all occaſions to ſend for a muſical inſtrument to recruit the exhauſted ſpirits, or reſtore the tone of mind when weakened by an intenſe application; yet I queſtion whether the effects of muſic, (ſo common and improved as it has been within this laſt century) are not ſtill ſo great as to make the accounts of the Antients leſs fabulous than they may ſeem at firſt notice. I will maintain, that you will ſtill find as much uſe of your inſtrument as you did before.

POLICRITES.

Whether I ſhall have time to uſe it as much as I did before, I cannot tell; but you may ſave yourſelf any farther trouble on that point, and proceed in your journey, for you have a great way yet to go.

EUNOMUS.

EUNOMUS.

Well; but in the laſt article you have granted me a little more than you think for. When Handel (whom for his comprehenſive genius I would venture to call the Homer of muſic) and thoſe other excellent chiefs of the muſical tribe, have ſuch pretenſions to your eſteem; has not Homer and every other favourite of the muſe a much greater claim to it? The amuſement from one ſource is not tranſient, as that from the other: it refreſhes and it improves; it is retained in the memory, refines the imagination, and augments the treaſure and powers of the underſtanding. The former compared to this, is like the ſmell of a flower, which however pleaſing, is a ſhort gratification of the ſenſes only: whereas this, like the delicacies that ſtrike

ſtrike the palate, when digeſted, becomes the fund and matter of nutrition.

§. 10. But in barely mentioning the name of Homer, I am put on recollecting a material advantage, that father of poetry, as well as many of his deſcendants, will afford to lawyers: —thoſe I mean, who either trace the great fountains of juſtice up to their head; or purſue the rivulets derived from thence in the innumerable channels of political inſtitutions. Homer alone is a maſter in both reſpects. As to natural notions of right and wrong, and ſome of the moſt elevated ſentiments of morality, the fabled waters of Helicon were ſcarce purer than his writings. And thoſe who are at all converſant in Grecian antiquities, know that many of the antient laws of Greece are preſerved in both his poems.

poems. Could it indeed be imagined, when ſomething in almoſt every art may be learned from Homer, that the great arts of government and legiſlation alone were unnoticed?

I might on this occaſion remind you of Terence, who beſides the utmoſt chaſtity of ſtyle and lively portraiture of manners, for which he is ſo famous, has, in copying Menander, preſerved many fragments of Athenian law. But inſtead of running over paſſages, or even the names of Roman poets, who have materials of this kind, I will appeal to the many eminent writers of natural and civil law for this century paſt, for the contributions they have levied on the poets and orators even for the materials of their ſubject; excluſive of the refreſhment they afford; and which Tully inſiſts is ſo neceſſary to a mind fatigued

fatigued with the wrangling and jargon of courts. In ſhort, it would be no difficult matter to furniſh out a poetical code; which need not, however, exceed the Corpus Juris, or our own Viner's Abridgment.

POLICRITES.

I muſt own I have as yet fondneſs enough for the poets, to prefer a quotation out of Homer or Euripides by way of amuſement to a ſtring of caſes out of the Reports: and the Greek type, in my eyes, is at preſent more agreeable than the Gothic letter. But my judgment is not to be corrupted by my imagination. I do not want to be told that the poets can entertain or inſtruct in matters of antient ſtory; but what have theſe things to do with an Engliſh lawyer? You may as well

inſiſt

inſiſt upon my making collections of pictures, coins, or foſſils.

EUNOMUS.

I ſhall ſcarce inſiſt upon your ſpending your income, and flinging away your time under a notion of improving your taſte. Not that I would have you imagine ſuch collections uſeleſs to any one, becauſe it might be improper to make them at his own expence. I ſhould be very ſorry that you ſhould be at the pains of hunting over all the records in the Tower, and wear out your eyes in tranſcribing them. And yet, what collections are more valuable in our profeſſion? In all theſe cares you muſt avail yourſelf of the diligence of others; or ſpend your life in heaping up materials which you can never be able to make uſe of.

POLI-

POLICRITES.

I begin to ſee a little clearer the limits of your ſcheme: for as you do not make it abſolutely neceſſary for me to collect the curioſities of my own country, you will probably diſpenſe with my being acquainted with thoſe of others in perſon. I was afraid I muſt have made the tour of Italy, ranſacked Herculaneum for antiquities, meaſured the Pyramids, or have been ſent on a pilgrimage to the Holy Land.

EUNOMUS.

No;—it is not every body that, like Scriblerus, is to make "his own legs "his compaſſes." You muſt be content to travel by deſcription, and worſhip the echo without expecting to hear the firſt report. What did your favourite Ulyſſes more by twenty

years travel, than obſerve the "αςεα ϗ "νοον ανδρων?" The firſt may be done with ſome profit, leſs time, and with leſs danger, by reading the accounts of others. Suppoſe that your own experience would have made a deeper impreſſion on the mind: and that the accounts of others are often imperfect for want of previous qualifications in thoſe who make them; then it will follow, that perſons muſt be qualified to improve by travelling as well as any thing elſe. And that circumſtance alone is ſufficient to ſhew, that thoſe who would travel to any purpoſe muſt be diſengaged from employments at home. Beſides, "men and manners" lay open to obſervation in one ſpot as well as another; and no way of life, I think, can ſee more of them than your own.

POLI-

POLICRITES.

You put me in mind of your own river, that reflects every flower that grows on its border: there is ſcarce a book in your ſtudy but I ſuppoſe you either have or will allude to in your diſcourſe. How comes it all this while, I have heard ſo little of my admired Tully, (as you was pleaſed to call him) and of thoſe "who ful-"min'd over Greece," to uſe the words of a poet*, that I may ſhew you have made ſome progreſs in my converſion.

EUNOMUS.

§. 11. I thought the Orators, both of Greece and Rome, had long before this ſpoken for themſelves; and I, by any recommendation of their art,

* Milton's Paradiſe Regained.

ſhould

ſhould have been in the condition of Plutarch's Sophiſt, who after having made a tedious harangue in praiſe of Hercules, inſtead of being thanked for his pains, was aſked, who had ſaid any thing againſt Hercules? The Orators of Greece and Rome are qualified as well as the poets to entertain in their turn: the poets, we are told, were their fathers; the likeneſs is ſtill viſible; the latter often reſembling the language and turn of ſentiment of the poets, and they in their formed ſpeeches, exhibiting ſome of the beſt examples of oratory. The ſpeeches of Homer, Virgil, and Milton, have an advantage, of which there is much reaſon to regret the loſs, in the remains of ancient orators. They in many inſtances contain a complete debate; and the ſubject is diſcuſſed with all the acrimony and invective of a ſpirited reply.

This example has been copied by the antient hiſtorians, who to introduce ſpecimens of their eloquence, have indulged a vein of fiction under the air of truth; and compoſed ſpeeches for their heroes, ſuited to the occaſions and characters they ſuſtain. And who is there, tho' he knows them to be fictions, tho' in the ſevere eye of criticiſm they are ſo many violations of hiſtorical truth, that would be deprived of thoſe excellent ſtrokes of eloquence, we meet with in Livy or Salluſt, Xenophon or Thucydides?

Orators have ſo near a connection with our profeſſion, that if your knowledge, as a lawyer, is to go any farther than your own breaſt, (and ſure, *ſcire tuum nihil eſt* — for what is a lawyer without clients,) how can you hope to communicate it with ſtrength and perſpicuity, without ſome aſſiſtance

derived

derived from that quarter? Perſuaſion is commonly the effect of art; and it is an art neceſſary to be cultivated by lawyers, becauſe their clients, always in oppoſition to each other, can never have the right and juſtice of the caſe in favour of both.

POLICRITES.

I hope you would not compare a wrangle in Weſtminſter-Hall, to a weighty debate in the Roman Senate? Or miſtake your own conſtitution ſo far, as to think that your orators at the bar are to make law juſt as they pleaſe. They may, and I believe often do, give proofs of their eloquence, by ſpeeches of an hour long; and a reply as long again. I could tell you of thoſe, who, in Shakeſpear's phraſe[f], "ſpeak an infinite deal of nothing;"

[f] Merchant of Venice.

but from the little that I underſtand, the caſes and acts of parliament muſt at laſt ſpeak for themſelves.

EUNOMUS.

As clear, ſettled, principles of law, I agree with you authorities cited are never diſputed or diſputed in vain. But is their own authority always ſo ſettled; or their meaning ſo clear and determined, as to admit of no altercation? Is there no difficulty in connecting them together, in ſuch a manner as to adjuſt them to the complicated circumſtances of the caſe in queſtion? Or when the law and the fact are aſcertained, is there no room upon ſome occaſions to apply to the diſcretion and equity of the Court?

I am a little ſurpriſed, however, to hear one that talks of the Conſtitution, entertain ſo mean a notion of Weſtminſter-

minſter-Hall. Have not Engliſhmen lives and property to defend as well as Romans? And you muſt needs know they are as jealous of attacks on either.

I will not go ſo far as to think their opinion worth an anſwer, who hold, that modern times are ſtrangers to, or rather will not bear Eloquence: becauſe I think they are ſufficiently refuted by fact. And the notion is as deſtitute of ſound judgment, as it is contrary to experience. Nor do I think the notion of others is better founded, who maintain, that an Engliſh bar will not admit of Eloquence, being of a nature extremely different from the courſe of judicature in Athens or Rome: from which as we are ſuppoſed to be acquainted with the only true models of eloquence; ſo the circumſtances of former times and differ-

ent forms of policy are thought to exclude all others as much from the application of eloquence, as from a competition with the great orators of thoſe days.

I am ſpeaking to one who knows from hiſtory and his own experience, that even here the fact is directly otherwiſe. But was I to borrow no argument from experience, it would be enough to ſay in general that Eloquence is the common child of freedom and of knowledge: that in any State, where the maturity of its learning keeps pace with the freedom of its conſtitution, men muſt have conſtant opportunities, and they will be able to make the beſt uſe of opportunities to perſuade or refute; will find ample field for panegyric or ſatire; will be able to raiſe or overcome occaſional oppoſition. All which are no other

other than the various modes and characters of eloquence conceived in the abſtract. Nor as to the particular application of it to our profeſſion, ſhould I think thoſe would have very firm ground to ſtand on, who would argue, that in a conſtitution governed by law, particularly in the very courſe of expounding that law, or debating on it, there can be no room for the free uſe of genuine eloquence: ſuch as, according to the true idea of it, may command the paſſions while it convinces the judgment; may bear down all oppoſition, and carry every thing in triumph before it.

To explain myſelf, I will not ſcruple to ſay, an addreſs to a Jury is the field for eloquence; as an addreſs to the Court is for argument. And thus (however they may accidentally intermix) the provinces of ſtrict reaſoning

and of eloquence, as to the preſent application of them, are as diſtinct from each other, as law and fact are. Nor yet would I ſcruple to allow, that in our books much fewer inſtances occur of Eloquence than of Logic, tho' I am contending, that the ſame Profeſſion is a ſchool for both. The reaſon is, one is a dry independent art that borrows no aſſiſtance from occaſion, time, or place: the other is ſo much indebted to all theſe, and above all, to the form of expreſſion and the manner of the ſpeaker, that the beſt account of it at ſecond hand, compared to its original exertion and influence, is like a print copied from a painting of Titian's or Claude Lorain's; which may be correct enough, perhaps, as to the deſign, but muſt be ſtript of the peculiar excellence of the original, its warmth of

colouring. And thus it is, that tho', for inſtance, the elements of Euclid, or ſome pieces of Ariſtotle's, are the ſame to us as they were to thoſe of his own times; the remains of Tully or Demoſthenes are not.

With theſe allowances, I may venture to add, that ſome few ſpecimens in the State Trials may be looked upon as excellent inſtances in this Profeſſion, both of argument and of eloquence: tho' I confeſs for the latter, it is always better worth while to conſult the times, than any books whatever.

When I ſpeak of the times, I am tempted in ſome meaſure to reſt my appeal to the preſent. For how can we reaſon better, than from what we are beſt acquainted with? I have intimated, trial by jury is the proper ſcene for eloquence: our ſubject therefore is confined to the Bar without going

ing ſo high as the Bench. And, I think, in this view I can remind you of the moſt diſtinguiſhed characters of eloquence, that all occur at this moment in one ſingle field of action. Of which, if any particular character ſhould be ſurpaſſed in other quarters, yet I am ſure no other quarter can produce ſo many together, and ſo totally different from each other.

The firſt in order, is a ſpeaker of ſo uncommon a flow of true natural humour, aſſiſted by great experience and obſervation of the world, that none but the object of it can refuſe to join in the laugh: a ſecond, always clear, ſenſible, fluent, and inſinuating: the next, a nervous and learned ſpeaker, and on occaſions a maſter of the moſt ſtrong and liberal irony: a fourth excelled by none for ſolid knowledge of his profeſſion, with a clear, ſtrong, and

and manly ſtyle of expreſſion. Then comes another, of whoſe peculiar excellencies, as a public ſpeaker, if I was to give my own opinion, I ſhould, without a moment's heſitation, refer it to his ſurpriſing ſubtilty and imagination.

After theſe, if after theſe, (who are the greateſt conſtellation of orators in our profeſſion, that adorn *any one particular ſpot out of Weſtminſter-Hall*) it was neceſſary to look out for a ſingle character, the moſt perfect in its kind; there is but one that I can remind you of; who, as he unites in himſelf many of theſe peculiarities, ſo the trial by jury, as much diſtinguiſhes even him beyond any other exerciſe of his abilities, as it does in this reſpect diſtinguiſh him from all others; who is confeſſedly allowed to be with eaſe the greateſt *niſi-prius* lawyer of theſe days;

if

if he was ever excelled, or even equalled in any other.

The outlines of theſe few characters, tho' faintly drawn, yet I hope with ſome degree of likeneſs, are ſufficient to ſhew our profeſſion has, in its own peculiar province, ſome pretenſions to eloquence. Beſides, thoſe who have acquired eminence in this profeſſion, ſeldom confine themſelves to the duties of this alone. The figure they have always made in the Senate, as well as the Hall, ſhews the uſe of eloquence more than any thing I can ſuggeſt to recommend it. And tho' their inclination or their opportunities may not always lead to politics, I mean the care of this kingdom, conſidered at large with reſpect to foreign meaſures, its commerce or its alies; yet ſure, under the notion of a legiſlature, none are more proper to attend and adviſe the making

ing of good and uſeful laws, on which the very being of a ſtate depends. Turn to any period in your own hiſtory, (you will ſcarce deny the uſe of hiſtory) you will ever find ſome illuſtrious perſons ſuſtaining the united characters of lawyers and ſtateſmen.

POLICRITES.

§. 12. I am ſo far from denying the uſe of hiſtory, Engliſh hiſtory I mean, that in my opinion, if any thing has a direct and immediate connection with law, it is this. I rather wonder, ſo little of this kind has been left us by perſons of this profeſſion. For who can be ſuppoſed to be better acquainted with the conſtitution, than thoſe whoſe province it is to defend it in ſo many ſhapes; and who, from the nature of their ſtation, are moſt converſant in records, the pillars of hiſtory? who,

who, from their acquaintance with evidence, the manner of ſtating facts diſtinctly, and examining what is or is not probable, can better fill up the draught of hiſtory as it is left us by one of the beſt judges of antiquity? "Nequid falſi dicere audeat, nequid "veri non audeat."—Perhaps it would be a ſlender commendation, where the track itſelf has been ſo little frequented in this Country, to ſay none have made a nearer approach to fame, thro' this avenue, than thoſe who have ſtood foremoſt in our Profeſſion. I think I need not explain my meaning by mentioning the hiſtories of Henry the Seventh, and the Civil war. That this track has not been more frequented by ſome of the ſame ſet of men, may be imputed to their want of leiſure; in ſome meaſure to a delicacy perhaps, in declining to relate tranſactions, in which

which their own part, tho' often conſiderable, was only ſhort. But in general it is much to be lamented, that in this Country, immortality of reputation, which is one great ſpur to actions, and wiſely made perhaps

The laſt infirmity of noble minds,

is after all left at the mercy of obſcure and private hiſtorians. We have few Xenophons and Cæſars; as few Bacons and Clarendons; few in any public capacity who have penned memorials of the times in which they lived; and deſcribed the ſcenes in which they acted themſelves.

EUNOMUS.

I wiſh by your own example you may increaſe the number: your opinion of hiſtory, I ſee is already ſtrong enough to excuſe my ſilence, as to its profit in your own profeſſion. I will

only make an obſervation that occurs to me at preſent, with regard to ſome circumſtances that I think more particularly uſeful to this end.

POLICRITES.

The only point in which at firſt hearing I have agreed with you, throughout your argument, was ſo far from being intended to ſtop you in your obſervations, that my curioſity and want of information in this particular will make me liſten with more pleaſure and attention.

EUNOMUS.

§. 13. I only wiſh you may not repent of your encouragement. As the chief uſe of hiſtory is to teach by examples, I think the drawing characters ought to be well regarded by hiſtorians, as it is the cleareſt manner of exhibiting

ing examples. There are but two methods of doing this: either they introduce the perſons into their hiſtory by drawing his character previous to the relation of the events that form it; or they kill him firſt, and then, after the manner of the Ægyptians, ſcrutinize his conduct. The uſe of drawing characters is confined only to the principal agents: ſubordinate inſtruments are not of ſufficient importance to merit ſuch care of the writer or attention of the reader.

In both caſes you will eaſily allow there is this juſtice due to the perſon from the hiſtorian "in drawing the "character correſponding to his ac-"tions," that is, ſuch as his actions taken together may warrant. In the language of our profeſſion, the character is to be conſidered as a verdict founded on the ſeveral actions related

by the hiſtorian, all of which are to be admitted in evidence. And the reader is to judge, whether the hiſtorian has given a true character, upon a ſuppoſition that all the evidence the hiſtorian had, is laid before the reader; for he can decide whether the character is drawn agreeable to that evidence.

But in the firſt caſe, writers often, in treating of their own times, give characters from their own perſonal knowledge; and conſequently, they may have evidence which is not laid before the reader, ſince the general character may have been formed by his cotemporaries on ſeveral actions, which make no part of the hiſtory; it may fairly be the reſult of private acquaintance in private life. In ſuch caſes it is no impeachment of the juſtice of the hiſtorian, if the actions related do not come up to the character

racter aſſigned the agent: it is ſuffi-cient in the main, that they do not contradict it. The character in theſe inſtances, is previouſly inſerted as an explanation of the ſubſequent actions; and they teach us to examine the judgment of the hiſtorian in the account of thoſe actions; ſince by being previouſly made acquainted with the character, we ſhall know whether the motives aſſigned as the cauſes of particular actions are juſt, by their correſponding with the general character. This method, you know, is common with Lord Clarendon, Burnet, and Swift.

§. 14. Among other modes of ſearching hiſtory, the ſtudy of comparative hiſtory ſeems of great ſervice. Our knowledge in general, is not ſo much increaſed by an acceſſion of new ideas, as by comparing the relations of thoſe ideas we already have. In the

ſame manner the knowledge of the Conſtitution is advanced by comparative hiſtory: that is, by comparing ſimilar events in the courſe of hiſtory; and by comparing the different accounts of the ſame event by different hiſtorians. The latter tends to eſtabliſh facts, as the other does to apply them. It is little more than idle curioſity, to treaſure up facts without applying them; but it would be dangerous to apply them to other caſes before their own credit is ſufficiently eſtabliſhed.

§. 15. I think there can hardly be any doubt that hiſtory is of great uſe in ſtudying the law of nations: indeed hardly any point can ariſe in the law of nations, but what may be proved or illuſtrated from thence. And the reaſon is plain. The cuſtom, uſage, and practiſe of different nations have, in many points that are indifferent

ent in themſelves, and not of natural obligation, been conſidered as the law of nations: and it is the buſineſs of the hiſtorian to record this practice and uſage, as far as it is connected with his proper ſubject. But when the law of nations is conſidered only as the law of nature applied to ſocieties, and ſo extends the obligations from nation to nation, which ariſe by nature between man and man; the uſe of hiſtory is leſs abſolute; and the examples it gives are to be conſidered not as proofs, but illuſtrations only. The reaſon is likewiſe plain: becauſe in this caſe it is the buſineſs of hiſtory, "to find the fact and not the law." The eternal difference between virtue and vice, will render the quality of an action under given circumſtances, preciſely the ſame in all ages. And therefore the number of examples in hiſtory

to any one point, will not create law in this reſpect, as it does in the other. And this difference muſt ever be attended to, or hiſtory will miſlead reaſon by falſe colours.

There is a natural connection between "law and fact;" I would almoſt venture to place them among Mr. Locke's inſeparable ideas. The latter undoubtedly gives riſe to the former, conſidered as poſitive inſtitution: for there are few things a legiſlature can foreſee before they happen; and the latter ſcarce ever do happen, but the mind, in its ſurvey of them, calls in the aſſiſtance of the former, (the former I now mean in a more extended ſenſe) by enquiring whether what has been done, is agreeable to the natural notions of reaſon, or the deductions of reaſon applied by poſitive laws to the convenience of ſociety.

There

There muſt be the ſame connection between "law and hiſtory," that there is between law and fact: for whether we hear of the facts or read of them in hiſtory, can make no difference; we judge of them by the ſame rule in either caſe. The hiſtorian indeed has it in his power to help us to form this judgment: and you well know this has been laid down as a rule for writing hiſtory; and the beſt writers (who in reality in all arts furniſh the rules) have complied with it. It is this that diſtinguiſhes Livy, for inſtance, from the "Annales Pontificum," the early form of hiſtory, which you may imagine was as dry as a pariſh regiſter, or at beſt on a level with a Gazette.

§. 16. But to apply this reaſoning more particularly to our ſubject: the connection between the law of Eng-

land and the hiſtory of England, is founded on their reciprocal uſes to each other. And the uſe of hiſtory to law, is evident in theſe particulars among others.

1. In giving the proper weight to written evidence, by enabling us to conſider the times of which it bears witneſs. Written evidence is of the higheſt uſe in matters of the greateſt conſequence, whether public or private in their nature; in queſtions of antient right, preſcriptions, and the like. And the written exhibits, produced either on the ſame ſide as parole evidence, or oppoſed to parole evidence, can never have their true force computed, without conſidering, beſides many internal circumſtances, (as their nature, how preſerved, in whoſe cuſtody, &c.) the ſtate of public affairs at the time they bear date;

and

and likewiſe in many caſes, the intervening hiſtory to the riſe of the queſtion; becauſe the temper of the kingdom, the prevailing notions (as I ſhall have occaſion to obſerve) often temporary and unconſtitutional; the peace or diſorder of the times; compared together as the ſubject requires, will beſt account for many things of this kind. And this comment of hiſtory on old inſtruments and exhibits, ſerves the ſame purpoſe as croſs examination does on the teſtimony of living witneſſes; it ſifts the truth, and ſeparates the droſs from the ore.

2. An infinite number of queſtions receive the only light they are capable of from the reflection of hiſtory; in a different view, I mean, than that already mentioned, of controuling written evidence. In caſes of private property, as tythes, cuſtoms of

places, manorial rights, &c. in theſe and many other particulars, it is neceſſary to know the original of the matter in queſtion, what the preſent ſtate of things ſucceeded, and what has been its progreſs. Hiſtory too in this caſe will not only explain ſubſequent laws, but will ſupply the ſilence of law itſelf.

3. Hiſtory, well attended to, will furniſh uſeful obſervations, and a kind of criticiſm on law books themſelves, with regard to their doctrine. For our reaſoning in this reſpect may ſometimes be extremely fallacious; and miſtakes may be of the worſt conſequence. We take a Report Book in hand, ſuppoſe; the caſe we conſult is extremely clear perhaps, and conſiſtent with itſelf; but the doctrine ſtartles us as remarkable. We therefore look into a cotemporary report: here too, ſuppoſe,

poſe, we find the ſame doctrine grounded on the ſame circumſtances of the caſe: and the credit of each report is confirmed by its conſiſtency with the other. But if the credit of the doctrine itſelf is in queſtion; we muſt look into the times; conſider who were the Judges, inquire into their character, in particular, from hiſtory, where hiſtory has been at all particular on the ſubject: and ſee whether it was a time, when the "little finger of the "law was heavier than the loins of "the prerogative;" or whether the ſervility of the times was ſuch, that the caſe was inverted in favour of the prerogative.

The times, I ſay, will explain law as well as facts. It is in this view only, and with the comment of hiſtory, that we underſtand the doctrine (for inſtance) laid down by a Chief

Juſtice in ſupport of a diſpenſing power, "that the laws of England are "the King's laws—that it is his prerogative to diſpenſe with them on "all urgent occaſions, of which he is "the ſole judge—and that this right is "not to be taken from him." The Chief Juſtice, however, argued logically, tho' not legally: allow him his principle, (and in ſupport of that principle, a power of putting any ſenſe he pleaſes on his aſſertion) that the "laws "are the king's laws," and his concluſion will follow, and to much greater extent than perhaps he intended. His principle would ſoon aboliſh a Parliament: for to what purpoſe, in any caſe whatever, is the concurrence of both Houſes neceſſary to make laws, which it is the King's inſeparable prerogative to break through?

Or

Or can there be a more deteſtable proſtitution of that awful character, than to be of opinion (as there were it ſeems ſome of opinion in 10 Rich. II.) that it is treaſon in a Parliament to proceed on any buſineſs in an order contrary to what the King may appoint? No wonder the ſame men, at the ſame time, maintained it was treaſon in a Parliament to impeach a Judge for his offences: no wonder too, that the Parliament afterwards refuted this opinion by impeaching thoſe very Judges, and ſacrificing them for their corruption.

One is rather more ſhocked at theſe doctrines, when they apparently affect life, than when they only aim at the invaſion of property. What can we ſay, to find it held in conſtruction of an act, "requiring two witneſſes for "treaſon," that one witneſs of his own

own knowledge, and another by hear-ſay from him, tho' at the third or fourth hand made two witneſſes or accuſers within the act. And yet this, every man (ſays a very honeſt and learned Judge) "who will do ſo much "penance as to read over the ſtate "trials during the reigns of Queen "Elizabeth, and King James, will "find to have been the doctrines and "practiſe of the times."

The truth is, the making Judges the mere tools of the crown; and ſetting one Judge to tamper with all the reſt, to know his opinion before-hand, and ſometimes to direct it, has been in diſtant times too much practiſed to make any unconſtitutional opinion at all, unexpected from thoſe few men who were not ſecured by good principles of their own. For while there were any Judges who wanted liberal education or principles,

principles, and Judges were entirely dependent on the crown, and the crown itſelf was on the heads of deſpotic or miſguided princes, bad men, when placed on the Bench, muſt have been more liable to temptation; and the Conſtitution, ever in ſome degree at their mercy, more liable to a wreck, than when their ſeat, to the immortal honour of our preſent Sovereign, became fixed for life; and the crown, as it now is and has long been, above thoſe mean and dangerous practices of corrupting the fountains of law, merely to give the moſt odious colours to temporary oppoſition.

I know not how I have fallen into a digreſſion of hiſtory, when I intended only to ſhew the connection law has with hiſtory: I will only further obſerve, that you may find too in the courſe of hiſtory, that the times will account for the particularity of laws

laws themſelves, as well as opinions on laws. It is equally true of all times, perhaps, what Chief Juſtice Vaughan ſaid of the æra of acknowledging the King's ſupremacy—"that "laws were then made, which in "the circumſtances of another time, "would not have been made." It is in a manner the genius of poſitive laws, to be called forth by particular events; and it is from hence they principally differ from the laws of nature, which are univerſal and immutable.

POLICRITES.

You have more reaſon to expect my thanks for your digreſſion, than I have your apology. But I would not have you imagine what you call prolixity in this reſpect, will excuſe an omiſſion in another. You have, according to your own diviſion, handled only one part of the queſtion: I expect now to hear

hear what is the return made by law to hiſtory.

EUNOMUS.

Very ample returns indeed, if from hence hiſtory borrows its beſt materials, as you rightly obſerved by calling records, the pillars of hiſtory. And who can doubt but from this quarter, in the moſt extended view, the greateſt events are to be looked for? Such as are moſt remarkable in their nature, and are the genuine, tho' ſecret cauſes of things that make more noiſe indeed in the world, and take up more room in hiſtory. Victories and triumphs, it is true, make a deeper impreſſion on common minds; but their laurels fade almoſt as ſoon as gathered. Treaties and alliances (which, however, as contracts, are objects of law) are connected with wars; but neither treaties, nor wars ariſing from

them or producing them, deſerve to be remembered, unleſs entered on in defence of our rights. Mere ambition tramples on ſecurity as well as juſtice. Turns of policy are to be referred to the ſame ſtandard. And it is amazing from what ſeemingly inconſiderable cauſes (in queſtions of civil right) ſome of the moſt extenſive ſchemes of policy have either been produced or promoted; that have been at length like rivers falling into the ocean, tho' their ſource was at a great diſtance, and ſo minute as to be ſcarce diſcernible. I need not remind you of the caſe of ſhip-money; or the foundation that was laid for the diſpenſing power in the trial of a private recuſant; and the viſible effect that had in the revival of popery; till in the end it produced the Revolution. All theſe caſes ſhew, how much, as I before hinted,

it

it lays in their power to preſerve the Conſtitution, whom the Conſtitution has made the guardians of its laws.

But I have been too long in theſe obſervations, conſidering I have as juſt a claim on your attention in other reſpects. Our Profeſſion, tho' principally that of the common law, (and I hope you will always conſider it as ſuch) is not however averſe to the ſtudy of other laws, to which, under the denomination of the common law, that is, (in my preſent meaning) the laws of England, it here ſtands oppoſed.

§. 17. The law of Nature not only ſhould be ſtudied as the ground of the great and fundamental laws in all ſocieties, but, becauſe the "ſtate of "Nature" itſelf does ſtill ſubſiſt in many reſpects, notwithſtanding the intervention of ſociety.

1. It is plain different ſtates with reſpect to each other, are ſtill in the ſame condition that different men were in before any ſociety was formed; that is, naturally equal and independent. That natural freedom ſubſiſts in all caſes, where it is not abridged by a mutual and voluntary treaty. Nay, even a violation of treaties, as well as an invaſion of natural rights, muſt be avenged by natural means. No other ſtate has a right to determine their differences upon an appeal; and if any ſtate interpoſes without mutual conſent, it juſtly riſques the enmity of the one, by adopting the cauſe of the other.

2. But even in any particular ſociety (governed, if you will, by as excellent laws as our own) the ſtate of nature muſt in ſome reſpect ſubſiſt between the members. It muſt ſubſiſt

in

in thoſe very few caſes, where the laws of the community cannot be appealed to. And hence it is, that all governments have allowed of ſelf-defence in thoſe caſes, where the laws made for their preſervation, cannot be appealed to till it is too late.

This right of ſelf-defence in caſes of extreme neceſſity, that remains in any one man after the exiſtence of ſociety, has, you know, been applied (as it may a fortiori be applied) to the right of the whole body of men in a ſociety, to defend themſelves againſt ſuch tyranny of its head, as *neceſſarily and directly in its own nature ſubverts the Conſtitution.*

It is on this principle Mr. Locke ſo nobly vindicated the *Revolution* from the cleareſt dictates of natural reaſon. His treatiſe is one of the moſt ſolid pieces of reaſoning, and at the ſame time the moſt artful vindication of the

public meaſures at that time. It is like thoſe mathematical lines which come infinitely near a curve without ever touching it. You ſee in every ſtep a defence of the Revolution, tho' the Revolution is not ſo much as named. It was his buſineſs to reaſon only from principles: the particular caſe he knew would apply ſo cloſe to thoſe principles, that the paſſions might be taken unawares, while they were aſleep: whereas, had he conſtantly kept the event in view, and reaſoned upwards from the event to its cauſe, ſo many little views of party or intereſt, would, in his time, have mixed themſelves in many readers enquiries, that reaſon might in the end have been ſilenced, and the paſſions have gotten the better.

The oppoſers of his doctrine, the advocates for hereditary, indefeaſible right

right to the Crown, muſt clearly exclude the notion of a truſt in him that wears it: a truſt ſo high in its nature, and ever ſo ſtrongly recogniſed in the oath of every one that wears it. Theſe gentlemen muſt, I ſay, exclude this truſt, and conſider a right to the Crown, like any other ſpecies of mere deſcendible property. And then, to be ſure, they argue well, tho' on the ſame narrow rules of law, as they would about the title "of a pig-ſtye "or a lay-ſtall," to uſe the expreſſion of a great advocate for civil liberty: an abſurdity not leſs than what Addiſon exhibits in an imaginary drama, of ſome young lawyers at a coffee-houſe, ſettling the ſucceſſion to the French monarchy by their own ſtatute law.

3. But there are things likewiſe, as well as perſons, that ſtill remain in

a ſtate of nature: not being ſubject to thoſe rules of property that civil ſtates have eſtabliſhed as to other things. Such is the ocean and the fiſh in it—the water of a river—birds of an untame nature—the right of enjoying the common light and air: the right of enjoying theſe is from nature, tho' the protection of that right is from ſociety; and hence, in many caſes, remedies are given by our law, for obſtructing the one and corrupting the other.

4. Nay, there are ſome regular aſſemblages of men, under the appearance indeed of ſociety, that either with reſpect to the reſt of mankind, or with regard to the individuals that compoſe them, may be ſtill deemed in a ſtate of nature; little more than mere occupants of the ſpot they inhabit; and ſcarce united by any civil ties, laws,

or

or contract. Many writers rank the Piratic ſtates of Barbary in the firſt claſs; as Mr. Locke does all abſolute monarchies in the latter. His argument, if I remember right, is, that it is the buſineſs of ſociety to appoint ſome common rule, which may be appealed to in every man's caſe; that no man may be a judge in his own, as he muſt be in a ſtate of nature. And therefore, in any government, if the will of a prince is ſo abſolute as to admit of no appeal, all his ſubjects are ſtill in a ſtate of nature; with this difference, that the Prince, inſtead of judging (and perhaps judging corruptly) in a caſe really his own, may make every caſe his own; and decide, without law or appeal, the caſe of every perſon in his dominions. And with this further difference, that a perſon in a ſtate of nature, indeed, is expoſed to the

the arbitrary power of all he meets with; but in a deſpotic government, he is expoſed to the arbitrary power of a ſingle perſon, who has an abſolute command of many thouſand men to enforce obedience to his will. Think of this, and bleſs yourſelf; you are born neither a Ruſs nor a Turk.

§. 18. The civil and canon laws are not to be forgotten, as part of our ſcheme: and both thoſe, as in many caſes they furniſh the grounds of proceeding in the temporal courts, in many inſtances are ſtill uſed; and the juriſdiction of courts proceeding by their rules, often devolve upon the common law Judges, are evidently connected with the ſtudy of our law.

POLICRITES.

I give very little credit to general aſſertions; and ſo be pleaſed to take a little

little trouble to explain yourſelf, as you are ſure to give me a great deal if you do it with ſucceſs.

EUNOMUS.

You will very eaſily underſtand the neceſſity of regarding each in its turn.

And firſt as to the Civil Law. Many of our antient writers, it is well known, often adopt the terms and reaſoning of the Civil Law. I grant, for this reaſon they ought to be ſtudied with caution; and to do this, you muſt know, when and from whence they borrow their notions. I agree with a learned Judge, "it was no wonder that Bracton, (for inſtance) who was a Doctor "of both laws before he came to our "bench, having no tolerable ſyſtem "of the Engliſh law, then in its in-"fant ſtate, ſhould adopt what he "found in the Books of the Civil

"and

" and Canon Law."—But one cannot conſider with patience, the attempts of Cowell in a more enlightened age, to form a narrow ſyſtem of the law of England in exact conformity to the Roman Inſtitute: or that he ſhould be countenanced, nay, encouraged in this attempt by the reigning Prince.

It was no uncommon thing we are told, for that King, to prefer the Civil to the Common Law; tho' in a ſpeech in Parliament, he as extravagantly retracted his preference, by ſaying, " if he was to chuſe a law for this " kingdom, he would prefer the Na- " tional Law, to the very law of God." " And yet in the very ſame ſpeech, within a few lines, he wiſhed for the " ſettling and amendment of that " very law:" tho' every body knows, he afterwards rejected the beſt opportunity,

tunity, that may ever occur, in a propoſal of Lord Bacon, in conjunction with the greateſt lawyers of that time.

The Civil Law, however, in due ſubordination, deſerves on many accounts to be ſtudied by the Profeſſors of our own.

The Law of England often borrows the rules of the Civil Law, in the conſtruction of wills and truſts: the latter was the offspring of the Civil Law, and both are treated by it with great preciſion and exactneſs. Our Law too has, perhaps, borrowed, at leaſt agrees with the Civil Law in, many other particulars.

In theſe, which will occur to any one turning over a ſyſtem of the Civil Law, and competently read in our own, a pleaſing analogy will be eaſily obſerved. The compariſon, however,

may (as it has been ſomewhere expreſſed) be more often like a globe and a plane, that touch only in one point, than like two planes which have an entire coincidence.

The difference of the two ſyſtems in ſimilar objects, will not, perhaps, be leſs pleaſing to an Engliſhman, or leſs inſtructive, than their agreement in ſome particulars. And how widely do we differ in laws of proximity; privileges of women; rules of evidence; rights of prerogative; atteſtations of wills, and inſtitutions of heirs under them? and happy for us almoſt entirely in criminal proceedings, as well as in the puniſhment of crimes, and very often the ideas of crimes themſelves?

I need not, after theſe weighty diſtinctions, mention ſome lighter ſhades, ſuch as the revocation of gifts for ingratitude;

gratitude; or in the donatio propter nuptias, where the match was broke off, with the extraordinary refinement of allowing the lady to retain half her portion as the price of a kiſs.

§. 19. You will think it leſs ſurpriſing, that our law ſhould have a mixture of the Canon rather than the Civil Law; as the Popes, you know, had a much longer and in one ſenſe a more abſolute dominion here than the Emperors: and tho' while Britain was under the Roman government, it would not be altogether a ſtranger to the Roman Law, yet the Saxon invaſion ſeems in a great meaſure to have ſwept it away. It was a mere accidental diſcovery of part of it, that gave the whole any footing in the weſt of Europe: and the times in which this diſcovery was made, when many ſtates were far advanced in their legal policy, will eaſily account

account for its inconſiderable progreſs.

Indeed, whatever reception it has met with in England, was the effect of ſilent conformity, not of legiſlative interpoſition; neither the Civil nor Canon Law, could have any real weight here, without a parliamentary ſanction. Any attempts of this kind were unlikely to be made in favour of the firſt; they were made, but ſometimes they were reſiſted with vigour as to the latter. Witneſs the memorable unanimity of the peers at Merton, in refuſing to legitimate children born before marriage; as the Canoniſts would have had them.

We have, however, many points of antiquity, as well as daily practice, from the Canon Law. The primitive inſtitution of our terms, the cuſtom of not going on with the buſineſs of terms

the term in the afternoon, the ſingular conceit of prohibiting Jurors, meat, drink, or candle-light, till they are agreed in their verdict; Sir Henry Spelman will tell you, are all either the text, or by way of gloſs on the Canon Law.

Many rules concerning the church, as to advowſons, patronage, rights of preſentation; others with regard to matrimony, privilege of clergy; and concerning teſtaments, are derived from the ſame ſource. Inſtances enough might ſoon be produced to juſtify Chief Juſtice Vaughan, in ſaying, "that tho' the knowledge of the "Canon Law be not an adequate "ſubject to an Engliſh lawyer, yet it "is a ſubject in common."

I will not ſtop to inſinuate the uſe of other laws, and of foreign writers, in many queſtions, that are agitated

in our courts of a very liberal nature; ſuch as the privileges of ambaſſadors, mercantile queſtions, nice points about the force of our laws in conquered countries; or the validity of our own laws, when they interfere with thoſe of other ſtates. Theſe might be curious, but would be too minute particulars, to interrupt an account of other ſyſtems, that have in courſe of time, been deeply interwoven in our own.

After what has been ſaid, the law of nature and the law of nations, I think, may be juſtly recommended as neceſſary to be ſtudied: they being in effect only ſo many applications of morality to a new ſet of objects. The Civil and the Canon Laws you will allow me to recommend, tho' on narrower grounds: they are not, it is true, like the Law of Nature, the common anceſ-

tor

tor of all thoſe independent maxims of juſtice, that are the foundations of all poſitive Laws; they are, however, undoubtedly the parents of many particular maxims in our law, and diſcover a relation by the ſimilitude of features.

§. 20. The ſame ſimilitude of features, and the ſame relation have been diſcovered between many parts of our own and the old Feudal Law. An Engliſh Lawyer, if he would attain the true perfection of his art, has, like the painter, his Lombard and Italian ſchools: our municipal ſyſtem in its progreſs, has copied the great draughts in them both. I have already mentioned inſtances enough in the one, and will juſt obſerve from memory, ſome particulars in which it has copied the other. The Laws of Deſcent ſtill prevailing; and the whole doc-

trine of Tenures, now in a great measure aboliſhed, are all grafted on this ſtock. Theſe are points, to which I can call you ſo many learned and unexceptionable witneſſes, among our legal antiquarians, that I will neither labour to prove nor explain them.

§. 21. I cannot pretend to ſay our Law has expreſly copied from any other poſitive ſyſtems, than what I have mentioned; tho' it may, and does in ſome inſtances, reſemble the particular conſtitutions of others. But conſider in the courſe of hiſtory, the variety of invaſions this iſland has ſuſtained, moſt of them in their turns productive of Laws; conſider, in a happier view, the mixed body of the Engliſh legiſlature; men various in their talents, their education, their purſuits and connections; many of them improved by an experience and know-

knowledge of other countries; conſider all this, and it will be no wonder that the law we live under is as compound as the atmoſphere in which we breathe: that the political maxims of other ſtates are adopted and made to conform to the genius of this: and by a kind of legiſlative commerce, the defects of our natural growth (if ſuch occur) are improved by the importation of foreign productions.

Thus, Policrites, have I ſufficiently inſiſted on the connection the ſtudy of the law has with other ſciences; whether I have made it out to your ſatisfaction, you are the beſt judge.

POLICRITES.

The only doubt I have now remaining, is, in what manner the practice

is

is to come near the theory? Let me hear you a little on this head.

EUNOMUS.

§. 22. I know not whether you mean to crown my labours with a compliment or a reflection: either to do me the injuſtice to ſuppoſe that I was, from the falſe light of vanity, delineating my own attainments, or that I ſhould have the preſumption to lay down rules for acquiring what I will own to you I never expect to attain. In both reſpects, my friend, you have miſtaken the drift of my argument. It is eaſy to conceive and propoſe much more than it is poſſible to effect: and in that light, the conqueſt of all thoſe ſciences, conſiſtent with your own, may, perhaps, be deemed. I was deſired only to explain this connection; I did it to vindicate the law from an

an illiberal notion, under which too many have repreſented it; and to ſhew that it is a ſcience not only connected with others, but in ſome meaſure including them all.

If Tully, who was himſelf the model of eloquence to his own and all ſucceeding times, could form an idea of a higher perfection than he could reach: I hope I ſhall be excuſed in adding, one may conceive more excellencies than any one lawyer ever poſſeſſed: tho' perhaps it ought to be the utmoſt of one's wiſh to be able to imitate the examples before us; more may not be granted to man. But the model of perfection here, like the Helen of Zeuxis, is to be formed in the mind by an imaginary aſſemblage of the greateſt peculiarities of different perſons; and ſo may conſtitute a happy union,

union, which can no more become visible than Plato's virtue.

To encourage you, Policrites, I need only add, Induſtry muſt be your ſecret: it is at leaſt as neceſſary in this Profeſſion as in any other. You muſt contrive to live longer than others in leſs time; and muſt date life by the application of time, rather than the number of years that barely mark its duration: which may be done by leſs vigilance than the "*ſex horas ſomno*" of your maſter Coke. It has been a prevailing notion in all ages, that a lawyer muſt riſe early. The *Gnavus mane forum*—and *Ad galli cantum*—of our friend Horace, will be good ſtanding leſſons: and I don't know why Homer may not ſpeak to a "Counſellor at "Law," (as well as a ſtateſman) when he ſays

Οὐ χρὴ παννύχιον εὕδειν βουληφόρον Ἄνδρα.

POLI-

POLICRITES.

§. 23. But after all, the Law, independent of other auxiliary arts, is itſelf of ſuch vaſt extent, that it is difficult to know how one perſon may be maſter of the ſeveral branches of it. It was this view that raiſed in me thoſe haſty reflections that you checked in the firſt origin; and by a very fair induction have proved to be inconſiſtent with that zeal I endeavoured to ſhew for my Profeſſion. I could now wiſh you would eaſe me of a burthen I ſtill have on my ſpirits, by pointing out in ſome degree, the connection that the ſeveral branches of the Law have one with another.

But I ſee you have ſome company at the other end of the garden, who are coming this way. All that I can expect now is your promiſe to enter-

tain me upon this ſubject another time.

EUNOMUS.

You may depend upon it, I ſhall readily do all that lays in my power; and you ſhall be welcome to my beſt endeavours the next time you come.

END of VOL. I.

I 98 35ST2 53 004 7 BR WV 6150

Stanford Law Library

3 6105 06 106 853 7